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REPORT OF THE WORKING GROUP ON INTERNATIONAL CONTRACT PRACTICES ON THE WORK OF ITS TWENTY-FOURTH SESSION (Vienna, 13 - 24 November 1995)

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I. INTRODUCTION

1. At the present session, the Working Group on International Contract Practices commenced work on preparation of a uniform law on assignment in receivables financing, pursuant to a decision taken by the Commission at its twenty-eighth session (Vienna, 2-26 May 1995).[1]

2. The Commission's decision to undertake work on assignment in receivables financing was taken in response to suggestions made to it in particular at the UNCITRAL Congress, "Uniform Commercial Law in the 21st Century" (held in New York in conjunction with the twenty-fifth session, 17-21 May 1992). A related suggestion made at the Congress was for the Commission to

[1] Report of the United Nations Commission on International Trade Law on the work of its twenty-eighth session (1995), Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 374 to 381.

resume its work on security interests in general, which the Commission at its thirteenth session, in 1980, had decided to defer for a later stage.[2]

3. At its twenty-sixth session, in 1993, the Commission considered a note by the Secretariat concerning certain legal problems in the area of assignment of claims and of past and current work on assignment and related topics (A/CN.9/378/Add.3). The note described briefly some of the legal issues in assignment of claims that gave rise to problems in international trade. Those issues included differences among national laws concerning the validity of assignments of claims, differing requirements for a valid assignment of a claim to be effective towards the debtor and conflicts of priority between the assignee and another person asserting a right in the assigned claims. The note suggested that a study should be prepared on the possible scope of uniform rules on assignment of claims and on possible issues to be dealt with in the rules. After considering that note, the Commission requested the Secretariat to prepare, in consultation with the International Institute for the Unification of Private Law ("UNIDROIT") and other international organizations, a study on the feasibility of unification work in the field of assignment of claims. [3]

4. At its twenty-seventh session, in 1994, the Commission had before it a report on legal aspects of receivables financing (A/CN.9/397). The report suggested that work might be both desirable and feasible, in particular if it were limited to assignment of international commercial receivables, i.e., claims for payment of sums of money that arose from international commercial transactions, including assignments by way of sale and by way of security, non-notification assignment, factoring to the extent that it was not covered in the UNIDROIT Convention on International Factoring (Ottawa, 1988; "the Factoring Convention"), forfaiting of non-documentary receivables, securitization and project finance. The report described a number of possible issues, such as no-assignment clauses, bulk assignments, form of assignment, effects of assignment between the assignor and the assignee, effects of assignment towards the debtor and towards third parties, as well as the related issue of priorities among claimants laying a claim on the assigned receivables. In addition, it referred to the possibility of international registration as a possible solution to the problem of priorities. The Commission expressed its appreciation to the Secretariat for pursuing cooperation with UNIDROIT, which was preparing a draft convention on security interests in mobile equipment, and with the European Bank for Reconstruction and Development (EBRD), which had prepared a Model Law on Secured Transactions. After discussion, the Commission requested the Secretariat to prepare a further study that would discuss in more detail the issues that had been identified and would be accompanied by a first draft of uniform rules. [4]

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[2] Report of the United Nations Commission on International Trade Law on the work of its thirteenth session (1980), Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17), paras. 26-28, (UNCITRAL Yearbook, vol. XI:1980, part one, II, A).

[3] Report of the United Nations Commission on International Trade Law on the work of its twenty-sixth session (1993), Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17), para. 301.

[4] Report of the United Nations Commission on International Trade Law on the work of its twenty-seventh session (1994), Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17), para. 210.

5. That more detailed report was presented to the Commission at its twenty-eighth session, in 1995 (A/CN.9/412). The report concluded that it would be both desirable and feasible for the Commission to prepare a set of uniform rules, the purpose of which would be to remove obstacles to receivables financing arising from the uncertainty existing in various legal systems as to the validity of cross-border assignments (in which the assignor, the assignee and the debtor would not be in the same country) and the effects of such assignments on the debtor and other third parties. The Commission expressed its appreciation to the Secretariat for pursuing cooperation with UNIDROIT, the Hague Conference on Private International Law, the European Bank for Reconstruction and Development (EBRD), the International Bank for Reconstruction and Development (IBRD) and, in the United States of America, the National Conference of Commissioners on Uniform State Laws. After deliberation, the Commission decided to entrust the Working Group on International Contract Practices with the work of preparing a uniform law on assignment in receivables financing.

6. The Working Group, which was composed of all States members of the Commission, commenced its work at its twenty-fourth session, held at Vienna from 13 to 24 November 1995. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Austria, Chile, China, Ecuador, Finland, France, Germany, Hungary, Iran (Islamic Republic of), Italy, Japan, Mexico, Nigeria, Poland, Russian Federation, Saudi Arabia, Singapore, Slovak Republic, Spain, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.

7. The session was attended by observers from the following States: Belarus, Bosnia and Herzegovina, Costa Rica, Croatia, Indonesia, Iraq, Paraguay, Philippines, Slovenia, Sweden, Switzerland, Syrian Arab Republic and Turkey.

8. The session was attended by observers from the following international organizations: European Bank for Reconstruction and Development (EBRD), Hague Conference on Private International Law, International Institute for the Unification of Private Law (UNIDROIT), Banking Federation of the European Union, Federación Latinoamericana de Bancos (FELABAN) and International Credit Insurance Association (ICIA).

9. The Working Group elected the following officers:

Chairman: Mr. David Morán Bovio (Spain)

Rapporteur: Mr. Masao Ikeda (Japan)

10. The Working Group had before it the following documents: provisional agenda (A/CN.9/WP.II/WP.85) and a Report of the Secretary-General on assignment in receivables financing (A/CN.9/412).

11. The Working Group adopted the following agenda:

1. Election of officers;
2. Adoption of the agenda;
3. Assignment in receivables financing;
4. Other business;

5. Adoption of the report.

II. DELIBERATIONS AND DECISIONS

12. The Working Group considered assignment in receivables financing on the basis of the Report of the Secretary-General on assignment in receivables financing, which contained preliminary drafts of uniform rules on certain of the issues dealt with in the Report ("the draft uniform rules"; A/CN.9/412).

13. The deliberations and conclusions of the Working Group, including its consideration of the draft uniform rules, are set forth below.

III. CONSIDERATION OF DRAFT UNIFORM RULES ON ASSIGNMENT IN RECEIVABLES FINANCING

A. General remarks

14. The Working Group began its deliberations with a general discussion of the commercial need for and the purpose of its incipient work in the area of receivables financing, and consideration of some of the possible guiding principles of that work.

15. It was noted that there had been an increased perception of a need for developing an acceptable international legal framework for receivables financing. The present legal environment, it was reported, was characterized by divergences among legal systems with the effect that cross-border assignments (in which the assignor, the assignee and the debtor were not in the same country) might be unenforceable against the debtor or might be challenged by creditors of the assignor. It was pointed out that the absence at the national level of modern legislation on assignment of receivables geared to the needs of international trade and the wide lack of treaty arrangements on the subject had come to constitute one of the most significant obstacles to receivables financing. This situation it was noted impacted in particular on commercial parties that had only limited access to potential sources of financing other than those based on receivables.

16. In terms of the broad aims and principles that could guide the work being undertaken, the Working Group was urged to strive for a legal text that would have the effect of increasing the availability of credit. It was said that the content and approach of that text should be guided by developments in current international commercial practice, rather than being based on particular national perspectives. It was observed that those aims would be furthered by facilitating "secondary financing" or "refinancing" of receivables, a type of transaction, also involving assignment, between the initial and a subsequent assignee that faced the same problem of possible ineffectiveness in a cross-border context.

17. An additional principle which was widely endorsed in the discussion was the desirability, in going beyond what had been accomplished internationally thus far in this field, of building on those accomplishments rather than attempting to supplant them.

18. In this regard, the attention of the Working Group was drawn in particular to the Factoring Convention. Attention was also drawn to the importance of having regard to the work currently

being undertaken by UNIDROIT regarding security interests in mobile equipment, as well as to the work of the International Bank on Reconstruction and Development (IBRD), which was involved in several national law reform projects in the area of secured transactions, and the European Bank for Reconstruction and Development (EBRD), which had prepared a Model Law on Secured Transactions.

B. Scope of application

19. The Working Group engaged in a discussion of the scope of application of the draft uniform rules based on a draft article, which read as follows:

"Draft article 1. Scope of application

"(1) These rules apply to the assignment for [commercial] [financing] purposes of receivables between an assignor and one or more debtors whose places of business are in different States:

(a) when the States [are Contracting States] [have adopted the rules]; or

(b) when the rules of private international law lead to the application of the law of [a Contracting State] [this State].

"(2) For the purposes of this [Convention] [law]:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the [contract giving rise to the receivables] [assignment] and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the time of the [conclusion of the contract] [assignment];

(b) if a party does not have a place of business, reference is to be made to its habitual residence."

Paragraph (1)

Substantive scope of application: "commercial" vs. "financing" purposes

20. The Working Group exchanged views as to the question whether the assignments to be covered by the draft uniform rules should be limited by a reference to a "commercial" or to a "financing" purpose.

21. One view was that the draft uniform rules should focus on assignments effected for "financing" purposes, rather than referring to the broader notion of "commercial" purposes. It was suggested that such an approach was desirable to avoid overlapping with the Factoring Convention. It was stated that referring to assignments for "financing" purposes would reduce the potential for overlap, in view of the fact that the Factoring Convention covered assignments for financing purposes only if one additional function among those enumerated in article 1(2)(b) of the

Convention (i.e., maintenance of accounts relating to the receivables, collection of receivables or protection against default in payment by debtors) were performed by the assignee.

22. As to the question of defining the "financing" purposes of assignments, a number of suggestions were made. One suggestion was to set forth the characteristic elements of receivables financing transactions, while at the same time giving an indicative list of assignments that should be included. Another suggestion was to create a rebuttable presumption that all assignments were for financing purposes and, at the same time, to list certain types of assignments that should be excluded. Yet another suggestion was simply to refer to the financing contract, as was done in draft article 2(2), without further specifying the nature of that contract. It was stated that such a flexible formulation was essential to preserve party autonomy in the context of receivables financing, the usefulness of which, as indicated by its rapid development, lay to a great extent in the ability of the parties involved to vary the details of assignments in order to address their needs.

23. A number of suggestions were made as to how overlap between the draft uniform rules and the Factoring Convention could be avoided. One suggestion was to provide that the draft uniform rules did not deal with factoring transactions. That approach drew the objection that it was so broad as to preclude the text from dealing with certain types of factoring and of factoring-related issues that were not covered in the Factoring Convention, as well as precluding coverage of factoring for States not parties to the Factoring Convention. Another suggestion was that, if the text to be prepared would take the form of a convention, a provision could be included along the lines of article 21 of the Rome Convention on the Law Applicable to Contractual Obligations (Rome, 1980; "the Rome Convention"), to the effect that the convention would not prejudice the application of international conventions to which a Contracting State was, or might become, a party.

24. Another view was that application of the draft uniform rules should be predicated on assignments effected for "commercial" purposes. It was stated that such an approach would have the advantage of encompassing a broader variety of assignments. It was observed that under such an approach only assignments effected for personal, household or family purposes would be excluded from the scope of application of the draft uniform rules. In the discussion, the attention of the Working Group was drawn to the need to distinguish between assignments for consumer purposes, which would likely be excluded from coverage, and assignments for commercial purposes of consumer receivables. In that connection, a note of caution was struck as to the desirability of covering assignments of consumer receivables, even if they were concluded for commercial purposes, in view of the social policy issues that might potentially be involved.

25. Yet another view was that, in order to achieve uniformity and to avoid the difficulty of having to distinguish the notions of "commercial" and "financing" purposes, all assignments should be covered, or alternatively assignments effected for "commercial or financing" purposes. It was also suggested that the text of the draft uniform rules might omit any reference at all to the purpose of the assignment.

Internationality test

26. The Working Group agreed that the draft uniform rules should cover both international and domestic assignments of "international receivables", namely, receivables in which the assignor and the debtor had their places of business in different States. Beyond that, the view was expressed that paragraph (1) should be reformulated so as to cover, in addition to international or domestic assignments of international receivables, international assignments of domestic receivables, namely assignments in which the assignor and assignee had their places of business in different States, while the assignor and the debtor had their places of business in the same State. In support of such coverage, it was stated that the international assignment of domestic receivables effected in the context of refinancing and securitization transactions was an increasingly important practice that needed to be covered.

27. Several concerns were raised with regard to that suggestion. One concern was that, merely by virtue of the domestic creditor's decision to assign its receivables to a foreign assignee, the domestic debtor might find its legal position subjected to a different legal regime. That result was said to be particularly undesirable if the debtor was a consumer, which would raise the question of the possible impact of the draft uniform rules on consumer protection issues. It was further observed that the matter raised questions beyond merely those of consumer protection, but reached into questions of debtor's rights and protection generally. In response, it was pointed out that the main concern of the consumer as a debtor was the maintenance of its ability to discharge its obligation to a known creditor and to raise against the assignee, whether foreign or domestic, the same defences that were available to the debtor against the assignor. It was noted that debtor protection issues, including, to the extent it would be relevant, consumer protection, could be addressed in the context of draft article 4, dealing with no-assignment clauses, and draft articles 9 to 12, dealing with debtor protection issues.

28. Other considerations raised regarding applicability of the draft uniform rules to domestic receivables included the concern that uniformity and harmonization of law might not be served if assignment of some domestic receivables were covered by domestic law, while assignment of other domestic receivables would be covered by the draft uniform rules, depending on whether the domestic creditor decided to assign the receivables to a foreign rather than to a domestic creditor. Yet another concern involved the potential implications of an international assignment for the question of the currency in which a domestic receivable should be paid and possible exchange controls. It was noted that that problem would arise in any case in the international assignment of international receivables and could be dealt with, if the principle were adopted that the debtor's obligation to pay should not be changed as a result of assignment.

29. After discussion, the Working Group affirmed that both domestic and international assignments of international receivables should be covered. With regard to the suggestion that international assignments of domestic receivables should also be covered, it was agreed that a provision to that effect could be prepared, but kept within square brackets, pending further consideration once the draft articles dealing with debtor protection issues had been discussed.

Territorial scope of application

30. It was noted that draft article 1, which in its present formulation resulted in the application of the draft uniform rules to domestic and international assignments of international receivables, required that the assignor and the debtor have their places of business in different States and that those States adopt the draft uniform rules. It was observed that, if the suggestion to enlarge the substantive scope of application of the draft uniform rules to include international assignments of domestic receivables were accepted, namely assignments between parties (assignor and assignee) whose places of business were in different States, the question would arise whether it would be necessary to require that the assignee have its place of business in a State that had adopted the draft uniform rules. The view was expressed that that would not be necessary since, in a cross-border context, only the law of the State of the debtor and the assignor would be relevant to enforcement, in view of the fact that the assignee would seek to enforce the assignment in one of those States.

31. The view was expressed that application of the draft uniform rules by virtue of the private international law rules, referred to in paragraph (1)(b) of draft article 1, could introduce uncertainty, as private international law rules on assignment were subject to uncertainty. Accordingly, it was suggested to delete the paragraph or to retain it in brackets pending further consideration.

Paragraph (2)

32. As to the question of which place of business would be relevant in case a party had more than one place of business, some preference was expressed for the place which had the closest relationship with the assignment. The view was also expressed that the place which had the closest relationship with the original contract and its performance might be a more appropriate reference point. It was suggested, however, that the Working Group might wish to revisit the matter, after it had considered further the question of whether to cover international assignments of domestic receivables.

C. Definitions

33. The Working Group considered a number of definitions based on a draft article, which read as follows:

"Draft article 2. Definitions

"(1) 'Receivable' means any right of a creditor to receive or to claim the payment of a monetary sum, unless it is in the form of a bill of exchange or a promissory note.

"(2) 'Assignment of receivables' means the transfer, by way of sale, as security for performance of an obligation, or otherwise, from one party ('assignor') to another party who provides financing to the assignor ('assignee') of receivables arising from a contract ('the original contract') made between the assignor and a third party ('the debtor').

"(3) 'Financing contract' means the contract by which the assignee provides financing to the assignor."

Paragraph (1)/"Receivable"

34. The suggestion was made to replace the term "receivable" by the term "claim", which might be more easily understood in various languages. However, it was generally felt to be preferable to retain the term "receivable" for consistency with the terminology of the Factoring Convention.

35. While the Working Group agreed that the right to payment was the essential element of the definition of "receivable", several observations were made as to detailed aspects of the definition. One was that the words "right ... to receive" might not capture the meaning of the term in an appropriate way. Another observation was that the reference to "a creditor" might inadvertently lead to the exclusion of some rights to payment that were intended to be covered, for example, royalties paid to the licensor of intellectual property. The suggestion was also made of a need to specify whether the reference to a "monetary sum" included foreign currency and commodities easily transferable into money, such as precious metals.

36. Differing views were expressed as to the types of receivables to be covered. One view was that all receivables in the form of negotiable instruments should be excluded, since their transfer was covered by other international texts. Another view was that, while emphasis could be given to non-documentary receivables, the application of the draft uniform rules to documentary receivables should not be excluded.

37. In support of such a broader approach, it was pointed out that negotiability was looked at in practice not from the point of view of the form of the instrument, but rather from the perspective of the protection of the transferee, which could be achieved in the context of the present work without necessarily excluding all negotiable instruments from the scope of application of the text to be prepared. In addition, it was observed that in practice there was a need for financing on the basis of receivables, irrespective of their form (contractual or unilateral, documentary or non-documentary), which should be accommodated. The example of "mortgage warehousing" transactions was given, in which notes incorporating lenders' receivables arising from home loans and secured by mortgages were put together in pools and sold by lenders in capital markets for refinancing purposes. This enabled lenders to obtain lower interest rates in capital markets and to make a profit while offering lower home loan interest rates. It was further explained that notes were kept in a central location where possession could be obtained by the buyers and that there was an increasing interest in replacing paper with electronic documents, the transfer of which was not regulated by any international legal text. A view was expressed, however, that in some countries arrangements such as "mortgage warehousing" were subject to regulation by special laws and should not be covered.

38. After discussion, the Working Group agreed that emphasis should be given not to the form in which the receivables might appear, but rather to the way in which they might be transferred, and that accordingly receivables transferred by way of assignment would be covered, while receivables to be excluded, including receivables transferred by way of endorsement, would be listed. The Working Group further agreed that contractual receivables should be covered, while the inclusion of non-contractual receivables (e.g., insurance, tort receivables) could be considered at a future session of the Working Group. It was suggested that the inclusion of further types of receivables, including receivables arising from leases or license agreements, could also be considered at a later stage.

Paragraph (2)/"Assignment of receivables"

39. As regards the scope of the notion of "assignment of receivables", there was general agreement that the definition should make it clear that the draft uniform rules were intended to apply to the entire range of assignment and related practices described in the document before the Working Group (A/CN.9/412, paras. 14 to 21), i.e., assignments by way of sale, of security, or in payment of a pre-existing debt. It was recalled that those practices included, apart from assignment proper, functional equivalents thereof, for example, depending on the national legislation applicable, legal techniques such as subrogation, pledge or novation. As a matter of drafting, it was widely felt that paragraph (2) was insufficiently reflective of the broad scope given to the notion of assignment, in that it relied on terminology typically used in the context of assignment by way of sale. It was agreed that paragraph (2) should be reworded using more neutral terminology, possibly to be combined with an express reference along the lines of "assignment by way of sale, by way of security or by any other method".

40. Triggered by the reference in the second part of paragraph (2) to "financing", the Working Group had occasion again to exchange views as to whether the applicability of the draft uniform rules should be linked to the purpose of the assignment. One view was that any reference to "financing" as the purpose of the assignment should be avoided since assignments of receivables existed outside the context of financing and such assignments should also be covered by the draft uniform rules. It was stated that, for example, in the context of insurance, the claims of an insured party against the party responsible for damages under tort law would typically be assigned to the insurer. Another view was that, should a reference to "financing" be included in the definition of "assignment of receivables", it should at least be accompanied by a definition spelling out the characteristic elements of "financing". With respect to a possible definition of "financing", objections were raised on the grounds that, in view of the fact that financing techniques were evolving rapidly, any such definition ran the risk of becoming rapidly obsolete, which might adversely affect the acceptability of the draft uniform rules. An alternative suggestion was to replace the reference to "financing" by a reference to assignment "against a monetary sum".

41. In favour of retaining the reference to "financing" in the definition of "assignment of receivables", the view was expressed that the focus of the draft uniform rules should be on the types of assignment that had financing as a common purpose. It was recalled that the mandate given to the Working Group by the Commission was to undertake the preparation of a uniform law regarding "assignment in receivables financing". A further view, which attracted considerable support, was that, although a general reference to the purpose of financing needed to be included in the draft uniform rules, it should not necessarily be made part of the definition of "assignment of receivables" under draft article 2. It was stated that, although the draft uniform rules should focus on financing transactions, nothing should prevent their being made applicable also to other types of assignments of receivables, irrespective of the purpose for which the assignment was concluded. While strong support was expressed in favour of deletion of the words "who provides financing to the assignor ('assignee') of receivables arising from a contract ('the original contract') made between the assignor and a third party ('the debtor')" at the end of paragraph (2), it was decided that the matter would need to be discussed further, after a decision had been taken regarding references to "financing" in draft article 1 and elsewhere in the draft uniform rules. As a matter of drafting, it was noted that, should the latter part of paragraph (2) be deleted as part of a deletion of the reference to "financing", the paragraph would still need to retain a definition of the terms "assignee" and "debtor".

42. With respect to the reference to "receivables arising from a contract" at the end of paragraph (2), the view was expressed that the definition should cover not only those receivables that arose from contracts but also other types, for example, receivables created by operation of law or by a decision rendered by a court of justice. It was generally felt, however, that such a broad notion of the receivables to be covered by the draft uniform rules might create conflicts with other legal regimes, possibly of a mandatory nature, which might be applicable to assignments of receivables generated by non-contractual mechanisms.

43. After discussion, the Working Group adopted the substance of the definition of "assignment of receivables", subject to further consideration of the reference to "financing", which it decided to place between square brackets.

Paragraph (3)/"Financing contract"

44. Differing views were expressed regarding the need for including a definition of "financing contract" in the text of draft article 2. One view was that such a definition was useful since it established a clear distinction between the assignment itself and the underlying financing transaction. It was also stated that adopting a broad definition of "financing contract" made it less likely that it would be necessary to describe in detail the various types of financing transactions envisaged in the draft uniform rules. Doubts were expressed, however, as to whether a definition of "financing contract" was needed at all, particularly in view of the fact that the notion was used only in the context of draft article 7, dealing with the breach of the financing contract. It was also suggested that the current definition was too bare to be helpful. After discussion, the Working Group decided to place paragraph (3) between square brackets, pending a final decision as to how the concept of "financing" would be dealt with in the draft uniform rules.

D. Bulk assignment

45. The Working Group discussed bulk assignments based on a draft article, which read as follows:

> "Draft article 3. Assignment of receivables
>
> "(1) An assignment of one or more receivables is effective if, when the assignment is effected or when the receivables come into existence, they can be identified as receivables to which the assignment relates.
>
> "(2) The assignment of future [or conditional] receivables operates to transfer the receivables directly to the assignee when they come into existence [or when the condition is fulfilled] without the need for a new assignment."

Paragraph (1)

General remarks

46. As a matter of drafting, it was generally felt that paragraph (1) currently dealt with too many distinct issues, which would be better addressed separately, either in several paragraphs of the same article or in separate articles. The following issues were identified as requiring separate treatment: recognition in-principle of bulk assignment and of assignment of single receivables; the notion of effectiveness of assignment as between assignor and assignee; the notion of effectiveness of assignment with respect to debtors and third parties; the criterion for effectiveness of assignment; the time when assignment was effected; recognition in-principle of assignment of future claims; the extent of the notion of future claim.

"An assignment of one or more receivables"

47. There was general agreement that an important aim of the draft uniform rules would be to overcome uncertainty under various national laws with regard to the validity of the assignment of more than one receivable, in particular assignments in which receivables were not specified individually, sometimes referred to as "bulk assignments". At the same time, it was generally felt that the assignment of single receivables was an important practice, in particular in the context of refinancing transactions, which could benefit from the draft uniform rules.

"is effective if,"

48. It was noted that, by relying on the unqualified concept of "effectiveness", the draft provision was intended to establish the conditions for the actual transfer of the assigned receivables not only as between the assignor and the assignee but also vis-à-vis the debtor and other third parties. On that point, the draft uniform rules deviated significantly from the approach taken in article 5 of the Factoring Convention, which dealt with the validity of the relevant provision in the factoring contract and its effects as between the assignor and the assignee, without affecting the position of third parties.

49. The view was expressed that the approach taken in the draft provision was inappropriate since it unnecessarily mixed the question of defining "assignment of receivables" for the purposes of the draft uniform rules, a question dealing essentially with the scope of the draft uniform rules, with issues regarding the rights and obligations of third parties. It was stated that such issues were too complex to be dealt with by way of a bare reference to "effectiveness" in paragraph (1) and that they should be further discussed in the context of the draft provisions dealing with the debtor's duty to pay and with priorities among several creditors laying a claim on the assigned receivables. It was suggested that the draft provision should be reworded along the following lines: "An assignment may relate to one or more receivables if ...".

50. While some support was expressed in favour of that view and it was agreed that the matter would be considered further, the prevailing view at this stage was that it was appropriate for the draft uniform rules to attempt to provide certainty with respect to such important issues as effectiveness and validity of an assignment erga omnes. With respect to the possible deviation from the approach taken in the Factoring Convention, it was felt that the preparation of the draft uniform rules should be regarded as a welcome opportunity to build on the result already achieved

by the Factoring Convention but also to go beyond that Convention, particularly regarding an issue such as effectiveness of the assignment vis-a-vis third parties, which could not be fully addressed in that Convention since it focused on the factoring contract and not on the transfer of receivables by way of assignment in general. As a matter of drafting, it was suggested that the reference to "effectiveness" in the draft provision might usefully be complemented by a reference to "validity".

"when the assignment is effected"

51. It was generally felt that the draft uniform rules should provide for effectiveness of an assignment at as early a point of time as possible, so as to avoid retention of the receivables in the estate of the assignor in case of insolvency. However, it was generally felt that the draft provision might need to be redrafted with a view to clarifying the point in time as of which the assignment should be regarded as effective. It was pointed out in that regard that the draft provision, which was formulated along the lines of "the assignment is effective when the assignment is effected", might appear to be somewhat circular.

"or when the receivables come into existence"

52. There was general agreement that the draft uniform rules should recognize, as a general principle, that future claims could validly be transferred by way of an assignment. While that principle might not currently be admitted under all domestic laws, or might be limited in some way (e.g., as in the case of a national law that recognized the validity of assignment of future receivables only if they arose within a specified period of time), it was noted that the assignment of future receivables was the essential basis of financing in the context of receivables financing transactions. However, although it was generally felt that a liberal approach to the assignment of future receivables was desirable from an economic point of view, the view was expressed that it should not be to the detriment of legal certainty, a result that could be avoided by setting out sufficient criteria as to the identification of future receivables.

53. Having settled on the desirability of adopting a liberal approach to the issue of assignment of future receivables, the Working Group proceeded with a discussion of the various types of assignment of "future receivables" that might be encompassed, noting that "future receivables" might vary considerably in nature and certainty. At one end of the spectrum were "fixed-term receivables", described as involving situations where the existence of the future receivable, the date as of when payment could be sought and its amount were certain (e.g., claims arising from a sales contract already concluded). At the other end of the spectrum, lay purely "hypothetical receivables" (e.g., claims that might arise if a merchant was able to establish a business and to attract customers). Between those two extremes, a variety of situations were conceivable, where the existence of the claim, its amount and date of payment might vary from "future" to "conditional" and even to purely "hypothetical". It was also suggested that, while the term "future receivables" would normally include "conditional" and "hypothetical" receivables, it should not include rights to payment arising from contracts existing at the time of assignment, whether or not the rights have been earned by performance.

54. Some doubts were expressed as to whether the draft uniform rules should recognize the entire range of "future receivables". It was stated that recognition of bulk assignments combined with complete freedom of assignment of future receivables might allow a business entity to assign all its

"future" and "hypothetical" claims for the entire duration of its existence, a practice that might run counter to public policy in certain countries. However, it was stated that although such public policy considerations might be raised in the context of transactions involving consumers, they might be less relevant in the context of international business transactions. As an example of a text dealing with international business practice, it was noted that article 5 of the Factoring Convention recognized assignments of future receivables without distinguishing between various types of future receivables.

55. Noting that the issue would be discussed further at a future session, particularly with respect to "conditional" and "hypothetical" receivables, the Working Group decided that, pending such further discussion, no limitation would be brought to the draft uniform rules as to the general recognition of assignment of "future receivables".

"they can be identified as receivables to which the assignment relates"

56. There was general agreement that identification of the receivables by linking them to the assignment to which they related should be the main criterion for determining the validity and effectiveness of their assignment.

Paragraph (2)

57. It was noted that paragraph (2) addressed three questions: the time at which future receivables would be transferred; whether future receivables would be acquired directly by the assignee or indirectly through the assignor, which was of particular importance were the assignor declared insolvent at the time the receivables would come into existence; and whether a new act of transfer was necessary when the receivables came into existence. It was further noted that paragraph (2) differed in two respects from article 5(b) of the Factoring Convention. One was the broader scope of the draft provision, in that the transfer under paragraph (2) was deemed effective not only as between the assignor and the assignee but also as against the debtor and other third parties. The other difference was the reference in the present draft to the direct acquisition of the future receivables by the assignee, namely, that the receivables were deemed to enter into the possession of the assignee without passing through the assignor.

58. In line with the intention to consider two variants of paragraph (1), one recognizing the validity of bulk assignments only as between the assignor and the assignee, and the other providing for the effectiveness of bulk assignments as against all parties, the Working Group agreed that a revised version of paragraph (2) should also include two variants along the same lines. However, a note of caution was struck to the effect that limiting the effects of assignment to the relationship between assignor and assignee might not be appropriate, since, in view of the fact that assignment was defined in draft article 1(2) as the transfer of property in the assigned receivables, assignment was bound to produce effects against all parties.

59. The view was expressed that it might not be appropriate to treat all future receivables in the same way, since they differed in the degree of certainty, a matter which was reflected in the varying amounts of credit made available on the basis of various types of future receivables. That aspect was reflected in the reference in the paragraph (2), within square brackets, to "conditional" receivables. The view was expressed that, in line with the distinction suggested above (see para.

53), paragraph (2) should cover "fixed" receivables only and not "conditional" or "possible" receivables.

60. After discussion, the Working Group agreed that, subject to further discussion, paragraph (2) should be revised so as to refer to "fixed", "conditional" and "possible" receivables, though the latter two types would for the time being be left in square brackets.

E. No-assignment clauses

61. The Working Group based its discussion on a draft article, which read as follows:

"Draft article 4. No-assignment clauses

"(1) Subject to article 9, the assignment of receivables shall be effective notwithstanding any agreement between the assignor and the debtor prohibiting or restricting such assignment.

"(2) Subject to article 10(2), nothing in paragraph (1) of this article shall affect any obligation or liability of the assignor to the debtor in respect of an assignment made in breach of the original contract."

Paragraph (1)

62. There was broad acceptance of including a provision along the lines of paragraph (1), which provided for effectiveness of assignments in spite of no-assignment clauses in the original contract between the assignor and the debtor. However, differing views were exchanged as to the possibility that such a provision might not be accepted by a number of States as part of a draft convention without the option of a reservation. It was noted in this regard that a similar provision in the Factoring Convention provided for a reservation, with the effect that an assignment made in contravention of a no-assignment clause would be ineffective if the debtor were from a reserving State. That approach reflected the position that giving effect to no-assignment clauses in such contexts ran counter to established legislation in some States.

63. Proponents of the reservation approach referred to the importance of respecting the freedom of contract of the parties to agree on a no-assignment clause and preserving good faith in the implementation of agreed contract terms. Reference was made to the possible increase in inconvenience or difficulties to the debtor that could result from having to pay to foreign assignees, especially if the debtor were a consumer. Examples cited included increased postage costs, having to deal with notifications received in a foreign language, possible increased litigation costs, and the possibility of having to pay the receivables in an unanticipated and potentially unavailable currency. It was stated that the latter consideration in particular would affect debtors in developing countries where there may be a shortage of foreign exchange and for which therefore at least some notice needed to be built in. Reference was also made to the possibility that the above considerations could affect in particular consumer debtors. The view was also expressed that special consideration may have to be given to debtors that were State entities.

64. In support of avoiding a reservation clause, it was stressed that the interests of the debtor that underlay the discussion could be adequately dealt with in provisions on debtor protection. It was

stated that a debtor-protection principle, which would alleviate the potential difficulties that had been raised, could be formulated along the lines that the debtor should be placed under no greater financial or other obligation by virtue of the assignment than the debtor would have been under if no assignment had been made.

65. Such an approach, it was stated, could encompass consumer protection concerns and would make it unnecessary to provide for a reservation, or to exclude consumer receivables, which risked limiting the extent to which the goal of facilitating receivables financing would be achieved. The Working Group was urged to bear in mind that, as a practical matter, the availability of consumer receivables for assignment constituted an important source for contemporary receivables financing and that imposing a requirement of individual notification and authorization would render assignments of consumer receivables impracticable. It was suggested that techniques could be found that would not encumber assignment of consumer receivables to a point of possible impracticability, for example, providing for payment to a specific account or post box.

Paragraph (2)

66. The Working Group noted that paragraph (2) was intended to ensure that the assignment effected in contravention of a no-assignment clause did not affect any rights that the debtor might have against the assignor for breach of the no-assignment clause. The question was raised whether the current formulation, which referred to an "assignment made in breach of the original contract" was appropriate, since it might be read as expressing a rule to the effect that such an assignment was indeed a breach of contract. It was pointed out that in fact the provision intended to leave to other applicable law the question of whether an assignment effected despite a no-assignment clause constituted a breach of contract and, were it to be considered such a breach, what the consequences of the breach would be. It was suggested that that point could be made clearer if paragraph (2) were to use more neutral language, avoiding reference to breach of contract.

67. It was suggested that another alternative, a more assertive approach, might be considered by the Working Group, one in effect invalidating no-assignment clauses. It was suggested that such an approach, found in some national laws, would be more effective in facilitating receivables financing since the possibility that a debtor would have a contractual claim against an assignor for violation of a no-assignment clause would create an undesirable degree of uncertainty in receivables financing. It was suggested that this potential jeopardy would be further heightened to the extent that there might be a ruling under applicable contract law that a violation of a no-assignment clause constituted a breach justifying termination of the contract between the assignor and the debtor.

68. Hesitation was expressed, however, as to the acceptability of including a rule invalidating no-assignment clauses. It was suggested that an assignment effected despite a no-assignment clause would in many legal systems fall within the broad category of breach of contract and that it would therefore be futile to attempt simply to invalidate no-assignment clauses. The view was expressed that the degree to which a less ambitious approach would harm the aims of the work was minimal, since the notion that contract termination was only justified in the face of a "fundamental" breach of contract was widely accepted, and since the violation of a no-assignment clause was unlikely to be regarded as such a fundamental breach. It was further pointed out that the assignor in such a case would be liable to the debtor only to the extent of damages actually incurred and proven, thus diminishing the potential impediment to receivables financing that might result from leaving the matter to other applicable law.

F. Transfer of security rights

69. The Working Group engaged in a general discussion of the effect that should follow from the assignment of receivables with respect to the rights that might have been created for the purpose of securing payment of those receivables to the assignor. In its deliberation, the Working Group took into account the relevant provisions of other uniform law texts, such as article 7 of the Factoring Convention and article 18 of the EBRD Model Law on Secured Transactions.

70. It was noted, at the outset, that the legal issues of establishment and transfer of security rights involved a variety of requirements of administrative and regulatory nature under existing domestic laws and were therefore complex. It was generally agreed that the draft uniform rules should not attempt to deal with all the details of the substantive law of security rights. Similarly, matters such as the procedural steps to be taken to secure the valid transfer of any given security right should continue to be dealt with by relevant domestic law. The draft uniform rules should be limited to establishing a general principle as to whether the assignment of receivables had automatic effect on the corresponding security rights.

71. As to the substance of that general principle, it was suggested that a distinction should be drawn between "accessory" and "non-accessory" or "independent" security rights. "Accessory rights", as existing under many national laws, were defined as security rights that could not exist or be transferred independently from the receivable, the payment of which they were intended to secure. Such "accessory rights" should thus be transferred automatically with the receivable to which they were linked. "Non-accessory" or "independent" security rights, such as independent bank guarantees, were defined as rights that might exist or be transferred independently, and should thus require a separate act of transfer. It was stated that relying on a distinction between "accessory" and "independent" security rights would avoid the difficulties that might result from any attempt to enumerate or describe the various types of security rights intended to be covered by the draft uniform rules. After discussion, it was agreed that the draft uniform rules should be drafted so as not to prevent the use of a distinction between "accessory" and "independent" security rights in those legal systems where that distinction was in use. It was widely felt, however, that embodying the suggested distinction in the draft uniform rules might not be helpful and that it might run counter to the general policy decision not to deal with all the details of the substantive law of security rights. It was noted that a distinction between "accessory" and "non-accessory" or "independent" security rights might not be acceptable to all legal systems. Moreover, even those national laws under which the distinction was recognized as meaningful, might vary considerably as to the definitions and contents of the "accessory" and "independent" categories of security rights.

72. The discussion focused on whether the transfer of a security right should automatically follow from the assignment of the secured receivable or whether it could only result from express agreement between the parties to the assignment. While it was generally agreed that the draft uniform rules should recognize party autonomy, it was pointed out that, from a practical point of view, addressing the issue of transfer of security rights merely by recognizing party autonomy on the matter of transfer of security rights might be seen as encouraging a formalistic approach that might prove to be excessively burdensome, depending on the nature of the assignment. For example, while a rule relying exclusively on party autonomy might be appropriate in the context of project financing, or other types of assignment involving an elaborate contractual framework, it might be less acceptable in the context of certain types of bulk assignments that were typically concluded without a specific contract being negotiated. It was also said that automatic transfer of

security rights would be more in line with the general purpose of the draft uniform rules, which was to facilitate financing through assignment of receivables.

73. As to how party autonomy should be recognized by the draft uniform rules, it was agreed that the general principle should be drafted so as to avoid being misinterpreted as making other rules of domestic law, possibly of a mandatory nature, subject to contractual agreements between the parties. For example, the draft uniform rules should not displace domestic law regarding mortgages, or other types of "accessory" security rights, that would, in all circumstances, be regarded as transmitted automatically with the secured receivable.

74. After discussion, the Working Group decided that the uniform rules should embody the principle of automatic transmission of rights securing the assigned receivables, subject to contrary agreement between the parties and to other rules of domestic law regarding the validity of such a transmission.

G. Form of assignment

75. The Working Group engaged in a discussion of the form of assignment, based on a draft article, which read as follows:

> "Draft article 5. Form
>
> "An assignment need not be effected or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses."

76. Differing views and concerns were expressed regarding draft article 5. One concern was that the general principle of a form-free assignment expressed in the draft article was not acceptable for those States whose legislation would require a contract for the assignment of receivables to be concluded in, or to be evidenced by, writing. It was noted that the draft article was modelled on article 11 of the United Nations Convention on Contracts for the International Sale of Goods ("the United Nations Sales Convention") and that article 96 of that Convention entitled those States to declare that article 11 did not apply where any party to the contract had its place of business in one of those States.

77. In response to that concern, it was stated that the purpose of the draft uniform rules was not to change the requirements and standards applicable to existing types of assignment contracts under domestic law but rather to create a new type of assignment. Thus, even in those countries where a writing was required for validity or for evidence purposes, the draft uniform rules should not be interpreted as an attempt to do away with general form requirements. The draft uniform rules were said to be merely intended to establish a limited exception to those requirements, in order to reflect modern international practice regarding assignment of receivables, which, in many instances, did not rely on written documents. For example, it was stated that it was essential that a provision along the lines of draft article 5 be included in the draft uniform rules to accommodate the use of electronic means of communication. Attention was drawn to the fact that the draft convention on international interests in mobile equipment, which was currently being prepared by UNIDROIT, was likely to require written form for any agreement creating such an interest. The purpose of such form would be to make clear that the parties intended to create an international, rather than a particular type of domestic, interest. In that regard, the view was expressed that account should be

taken of the proposed rule in preparing the draft uniform rules, in particular since certain receivables that might be covered by the draft uniform rules, such as receivables arising from lease contracts, might also fall within the scope of the UNIDROIT draft convention.

78. Another concern was expressed with respect to the substance of the principle of a form-free assignment embodied in the draft article. It was stated that, while complete freedom regarding the form of an assignment was acceptable as between the assignor and the assignee, it might insufficiently protect the interests of third parties. For example, it was stated that recognizing the validity of a purely oral assignment might create opportunities for abuse or fraudulent collusion between the assignee and the assignor, particularly in situations where the assignor might become insolvent. It was suggested that an exception should be made to the general principle of a form-free assignment, to the effect that purely oral assignments could not be opposed to third parties. In response, it was stated that the interests of third parties should not be addressed by imposing restrictions as to the form of the assignment but by establishing an obligation to notify third parties of the assignment. It was suggested that the discussion should be resumed after the Working Group had completed its consideration of other draft provisions, such as draft article 9, which established the principle of a notification for purposes of debtor protection.

79. After discussion, the Working Group postponed its decision until it had completed its review of the draft uniform rules and its general discussion of the issues of third-party protection. The Secretariat was requested to prepare a revised draft article, including variants reflecting the above-mentioned views and concerns. It was pointed out that, should the draft uniform rules establish form requirements to apply in the context of relationships involving third parties, they should also clarify the effects of non-compliance with those form requirements. For example, the draft uniform rules could either make a purely oral assignment ineffective vis-a-vis third parties or, alternatively, leave such an assignment outside the scope of the draft uniform rules. It was agreed that those options should also be provided among the variants to be considered by the Working Group at a future session.

H. Warranties between assignor and assignee

80. The Working Group engaged in a discussion of warranties that might be undertaken by the assignor towards the assignee based on a draft article, which read as follows:

"Draft article 6. Warranties

"(1) Unless otherwise agreed between the assignor and the assignee [in the contract of assignment], the assignor warrants to the assignee that the assigned receivables exist.

"(2) For the purposes of paragraph (1) of this article, the receivables shall be considered as existing if the assignor is the creditor, has a right to transfer the receivables and has no knowledge, at the time of assignment, of any fact that would deprive the receivables of value.

"(3) Unless otherwise explicitly agreed between the assignor and the assignee [in the contract of assignment], the assignor does not warrant towards the assignee that the debtor will pay."

81. It was noted that, while the types of warranties given as to the receivables by the assignor towards the assignee were a matter of contract, it might be advisable to address the question of warranties in view of their importance for the allocation of risk between the assignor and the assignee for hidden defences of the debtor and in view of the potential impact that the breach of such warranties might have on the transfer of receivables.

Paragraph (1)

82. The Working Group felt that paragraph (1) reflected a sound principle that could facilitate receivables financing by recognizing party autonomy in the allocation of risk between the assignor and the assignee for unknown defences of the debtor and by properly allocating that risk in the absence of an agreement.

83. As to the exact formulation of paragraph (1), a number of concerns were expressed. One concern was that the assignor and the assignee should not be allowed to vary the content of the warranty as to the existence of the receivables, which flowed from the basic obligation to act in good faith. The suggestion was made that at least the warranty should be varied only by way of an explicit agreement between the assignor and the assignee (see para. 88 below). Another concern was that the words "in the contract of assignment", which appeared within square brackets in paragraph (1), could prejudge the context or manner in which assignment might take place and should be deleted. Yet another concern was that the term "warrants" was not sufficiently clear. In that connection, it was noted that, while it was difficult to identify an equivalent term, in the United Nations Convention on International Bills of Exchange and International Promissory Notes, the term "represents" had been used in order to refer to the warranties given by the transferor of an instrument to the holder.

84. Yet another concern was that the word "assignee" might introduce an inappropriate restriction, to the extent that the assignor might be seen to give the warranty to the immediate assignee only and not to any subsequent assignee. It was pointed out that, as a result of the present formulation, the subsequent assignee might be able to turn only to the immediate and not to the initial assignor. It was stated that the initial assignor would presumably have to reimburse the subsequent assignee, but only pursuant to a series of subsequent actions and provided that the chain of assignors would not be interrupted by the insolvency of one of them. Yet another concern was that the words "that the assigned receivables exist" might be interpreted as not encompassing future receivables.

Paragraph (2)

85. Several observations were made as to the formulation of paragraph (2), regarding the content of the warranty that the assigned receivables existed. One observation was that the words "a right to transfer" introduced some uncertainty, since a right to transfer did not exist in case of a no-assignment clause, though an assignment in contravention of such a clause might be considered effective (see paras. 62-65). It was pointed out that those words were intended to address situations in which the assignor might not have the right to assign certain receivables, because it might have already assigned them or because of general reasons relating to lack of capacity or authorization. In response, it was suggested that the former problem was covered by the requirement that the assignor be the creditor, while problems of the latter type were beyond the scope of the present work of the Commission.

86. Another observation was that the reference to the assignor having no knowledge of any legal defects of the receivables placed on the assignee the risk of defences of the debtor that were unknown to the assignor, which could often occur in practice, in particular in cases where the assignor was the seller of goods manufactured by a third party. It was pointed out that that way of allocating the risk would result in the increase of the cost of credit and, in addition, was inappropriate, since the assignee was not a party to the original contract and could not do anything to reduce the risk.

87. Yet another observation was that the reference to deprivation of "value" could be understood as referring to economic value, which would place on the assignor the risk of a change in general economic conditions or in the economic position of the debtor. In order to address that concern, it was suggested that it should be clarified that the term "value" was intended to refer to hidden legal defences of the debtor.

Paragraph (3)

88. There was broad support in the Working Group for the principle expressed in paragraph (3) that the assignor did not warrant that the debtor would pay. It was noted that this reflected a rule known in most legal systems. It was also noted that, in view of the fact that the warranty in paragraph (3) involved a risk higher than that foreseen in paragraph (1), it could be varied only by way of an explicit agreement.

I. Breach of financing contract

89. The Working Group considered the effects of breach of the financing contract by the assignor on the basis of a draft article, which read as follows:

> "Draft article 7. Assignor's breach of financing contract
>
> "(1) When so agreed, and in any event if the assignor defaults on its obligation to pay in accordance with the financing contract, the assignee is entitled to notify the debtor pursuant to article 9 to pay the assignee.
>
> "(2) In an assignment by way of sale, unless otherwise agreed by the assignor and the assignee, the assignee may retain any surplus, and the assignor is not liable for any deficiency.
>
> "(3) In an assignment by way of security, unless otherwise agreed by the assignor and the assignee, the assignee must account to the assignor and return any surplus, and the assignor is liable for any deficiency."

Paragraph (1)

90. The discussion suggested a general accord with the substantive rule of paragraph (1), to the effect that a breach of the financing contract would entitle the assignee to collect the proceeds of

the receivables. It was also noted that the intent of the paragraph was to refer to a variety of financing situations, some of which might not be linked to a default by the assignor as the event triggering the assignee's rights with respect to the receivables, and to acknowledge the freedom of contract of the assignor and the assignee to define the effects of breach of the financing contract. Questions were raised, however, as to the extent to which the current formulation of the draft article expressed those basic principles on which the Working Group was in agreement and distinguished between different categories of cases intended to be covered.

91. Comments of such a drafting nature were directed in particular at the words at the beginning, "when so agreed". It was noted that as presently drafted those words might inadvertently suggest the need for a specific agreement beyond the contract of assignment in order to vest in the assignee the rights inherent in the assignment. It was noted that the intent of those words was merely to refer flexibly to the freedom of contract of the parties to define the terms of the assignment, including the point of time when the right to collect the proceeds of the receivables would be triggered other than upon a default under the financing contract.

92. An example cited in this connection was the type of financing structures in which the debtor received notification of the assignment, but was instructed that payment should continue to be made to the assignor until subsequent notice directing otherwise. Another example was the case in which the lender (assignee) at the outset notified debtors and sought to collect on receivables, which had been assigned as security, though collection may involve payment to a post office box or account to which only the lender had access. Reference was also made to the existence of financing structures that did not require notification of the debtor, with payment continuing to be made to the assignor.

93. Views were also expressed to the effect that the expression referring to the entitlement of the assignee "to notify" the debtor to pay might create some uncertainty by perhaps being unnecessarily indirect. It was stated that the effect of breach of the financing contract would ordinarily be to entitle the assignee, as the new creditor of the receivables, to collect the proceeds of the receivables.

94. Other observations concerning the formulation of paragraph (1) were directed at the appropriateness of the reference to "default on its obligation". The appropriateness of that expression was questioned for the context of sale of receivables, as a result of which the assignee presumably would be the owner of the receivables. The expression was also questioned because it used different wording than the corresponding expression in the United Nations Sales Convention, phrased in terms of "failure to perform".

Paragraphs (2) and (3)

95. Several observations were also made as to the content and formulation of paragraphs (2) and (3), which dealt with the questions of surpluses and shortfalls between the amount paid by the assignee to the assignor in return for the assigned receivables and the amount paid to the assignee by the debtor. One observation was that the attempt to draw a clear distinction between assignment by way of sale (dealt with in paragraph (2)) and assignment by way of security (addressed in paragraph (3)) might be problematic. It was pointed out that, because of the variety of different forms of transfers of receivables and because of differences that existed among legal systems as to classifications of transfers, some transfers of receivables that might be denominated as transfers by way of security could in fact possess attributes of transfers by way of sale. The Working Group

acknowledged that concern and expressed its understanding that there may be cases in which, in an assignment by way of security, the transfer of property in the assigned receivables could be involved.

96. Some doubt was also expressed in this context as to the rules set forth in paragraphs (2) and (3), as it was observed that the parties would not necessarily wish to be bound in a manner that might leave uncertain the net economic effect of collection of receivables merely because of the form or category into which a transfer might fall. It was suggested that such an approach might suggest a speculative or profit-making dimension in assignment of receivables that might not be congruent with the basic financing purpose of the transaction. It was pointed out in response, however, that the rules set forth in the two paragraphs, which were subject to party variation by contract, were merely intended to be default rules or starting points of reference aimed at eliminating the need to negotiate in all cases the allocation of risk referred to if the parties were not inclined to negotiate solutions other than those provided in the draft uniform rules.

97. As a drafting matter, the Working Group noted that certain terms used in paragraphs (2) and (3), in particular "surplus" and "deficiency" were undefined and might not be properly understood. It was also noted that the title of the article "breach of financing contract" might not fully correspond to its content, in particular since paragraph (2) did not involve a breach of the financing contract.

J. Effects of assignment towards the debtor

1. Debtor's duty to pay

98. The Working Group engaged in a discussion of the debtor's duty to pay based on a draft article, which read as follows:

"Draft article 9. Debtor's duty to pay

"(1) The debtor is entitled, until the debtor receives notification in writing of the assignment in accordance with paragraph (2) of this article, to pay the assignor and be discharged from liability.

"(2) The debtor is under a duty to pay the assignee if the debtor has not received notification in writing of a prior assignment, of a judgement attaching the assigned receivables [or of the insolvency of the assignor] and:

(a) the debtor receives [an unconditional] notification in writing of the assignment by the assignor or by the assignee with the assignor's authority; and

(b) the notification reasonably identifies the receivables assigned and the assignee to whom or for whose account the debtor is required to make payment.

"(3) If requested by the debtor, the assignee must furnish within a reasonable period of time adequate proof that the assignment has been made, and unless the assignee does so, the debtor may pay the assignor and be discharged from liability.

"(4) 'Notification in writing' means a notification provided in a form that the information contained therein is accessible so as to be usable for subsequent reference, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

"(5) Irrespective of whether the assignment is in writing or not, a summary statement in writing about the assignment in accordance with paragraph (2) of this article constitutes notification in writing under paragraph (4) of this article.

"(6) Payment by the debtor to the assignee shall discharge the debtor from liability if made in accordance with this article or other applicable law."

Paragraph (1)

99. Views were exchanged as to the question whether actual knowledge of the assignment by the debtor should have the same result as notification, namely to preclude the debtor from paying the assignor in order to be discharged.

100. One view was that "knowledge" of the assignment by the debtor should be an alternative way of triggering the debtor's obligation to pay the assignee. In support of that view, it was observed that the need to preserve acceptable standards of conduct in practice made it necessary to counterbalance, on the one hand, the need for certainty and, on the other hand, regard for ethical conduct by the parties. It was argued that it would run counter to good faith to allow the debtor to pay the assignor in cases in which the debtor actually knew of the assignment. Moreover, it was stated that paragraph (1), as presently formulated, appeared to positively allow the debtor to pay the assignor even if the debtor had actual knowledge of the assignment, possibly overriding domestic law good faith requirements.

101. Another view was that the duty of the debtor to pay the assignee should be triggered only by notification rather than, as was proposed, also by knowledge of the assignment in the absence of notification. It was stated that a notification approach was essential for the protection of the debtor, which was the main purpose of the draft article, in particular in order to ensure that there was no doubt as to whom the debtor should pay in order to be discharged. In that connection, the view was expressed that a related principle, which was of paramount importance for the protection of the debtor and should be explicitly stated in this draft article, was that the debtor should not be disadvantaged as a result of the assignment.

102. In addition, it was stated that a rule along the lines of paragraph (1) was a useful indication of what would be the proper behaviour of the debtor before notification and was in line with normal business practice. It was said that in practice parties normally intended the debtor to continue making payments to the assignor until notification was given. The example was given of securitization transactions in which it was customary for the debtor to have knowledge of the assignment but to continue making payments to the assignor and not to the assignee, which was a special corporation established for the sole purpose of issuing and selling securities without having a structure geared to receiving payments of the assigned receivables.

103. Moreover, it was stated that, while making business practice conform to good faith standards was an important goal, this should not be at the expense of certainty, which would be the case if knowledge of the assignment were to trigger the debtor's duty to pay the assignee. In that regard, it

was noted that a number of questions would need to be addressed, including what constituted knowledge, who had to prove knowledge, what the content of knowledge would have to be and how knowledge of the assignment should be treated in case of several conflicting assignments.

104. After deliberation, the prevailing view was that "knowledge" of the assignment by the debt should not be made a sufficient condition for the debtor to pay the assignee, while cases in whic bad faith or fraud on the part of the debtor might be involved could be left to the applicable domestic law.

105. The Working Group then turned to the question of whether notification should be a conditi for the effectiveness of assignment towards the debtor or merely a defence of the debtor in case assignor challenged the payment made by the debtor to the assignee. It was noted that paragraph (1), read in conjunction with paragraph (1) of draft article 7, which provided that bulk assignmer were effective upon their conclusion, gave the debtor, who knew of an assignment but had no notification of it, an option to pay the assignor or the assignee and be discharged.

106. The concern was expressed that allowing the debtor the choice of paying more than one person in order to be discharged could give rise to uncertainty. Another concern was that it mig be inconsistent to provide that a bulk assignment was effective towards the debtor upon its conclusion and, at the same time, that the debtor may refuse to pay to the assignee before notification of the assignment.

107. In response to those concerns, it was stated that such an approach in effect would mean th the debtor before notification of the assignment could pay the assignor and be certain that it wo be discharged; if the debtor chose to pay the assignee, and the assignor challenged that payment the risk of proving the assignment would be on the debtor.

108. While the explanation given was considered to be to some extent satisfactory, the suggesti was made that, if that was the intention of paragraph (1), it should be explicitly stated that, whil before notification the debtor was entitled to pay the assignor, it could also pay the assignee an discharged. That suggestion was objected to on the ground that a clear discharge rule for the debtor in case of payment to the assignee before notification could have a negative impact on certain transactions, including securitization, in which the debtor was expected to continue maki payments to the assignor. The view was expressed that it would be preferable to provide a clea rule for debtor discharge by payment to the assignor before notification, while leaving the quest whether the debtor could be discharged by paying the assignee to other applicable law.

109. In the discussion, the suggestion was made that the Working Group may wish to consider extent to which the assignee should be bound by modifications in the original contract entered i by the assignor and the debtor after the assignment but before notification of the debtor.

110. After deliberation, the Working Group agreed that paragraph (1) as presently formulated v acceptable in principle.

Paragraphs (2) and (3)

Chapeau

"if the debtor has not received notification in writing of a prior assignment"

111. It was noted that pursuant to paragraph (2) the debtor was under a duty to pay the assignee in order to be discharged if it had received notification of the assignment to that assignee, without having received notification of a prior assignment. Doubts were expressed as to whether the chapeau of paragraph (2), as presently drafted, covered situations in which a multiplicity of notifications of several assignments were involved.

112. The view was expressed that, if paragraph (2) were intended to address situations in which one assignment was involved, it would be acceptable in principle. If, however, paragraph (2) were to cover cases in which several notifications of conflicting assignments were made by adopting the rule that the debtor should pay the first assignee to notify, some tentativeness should be attached to that formulation, since such a rule could prejudge the answer to the question which of several conflicting assignees had priority.

113. Another view was that the question of multiple notifications was one involving the debtor's protection and not the question of priority among several conflicting assignees, and should therefore be addressed in the context of paragraph (2). In that regard, it was stated that the principle that the debtor should be discharged by paying the first assignee to notify was a sound one and could be accepted, since it provided certainty as to whom the debtor should pay in case of multiple notifications. The question whether, as among multiple assignees themselves, the first assignee to notify the debtor, having received payment by the debtor, could retain that payment was a different one and could be dealt with in the context of the issue of priorities among several conflicting assignees.

114. While the Working Group found the substance of the chapeau of paragraph (2) to be acceptable, it agreed that the matter of multiple notifications should be revisited after the Working Group had an opportunity to consider draft article 14 (priorities) and draft article 15 (subsequent assignments).

"of a judgement attaching the assigned receivables or of the insolvency of the assignor"

115. General support was expressed in the Working Group in favour of exempting from the debtor's duty to pay the assignee cases of attachment judgements and of insolvency of the assignor. The view was also widely shared that the chapeau should be expanded to cover other steps of the judicial, or non-judicial, process (e.g., attachment before judgement, other measures resulting from operation of law or from orders issued by a non-judicial body). With regard to insolvency of the assignor, reference was made to taking into account the work of the Commission on cross-border insolvency. The view was also expressed that insolvency of the assignor raised different issues from the issues arising in the context of attachment of receivables and should be looked at in more detail.

Subparagraph (a)

"[unconditional] notification"

116. It was noted that the term "unconditional", which appeared within square brackets, was intended to protect the debtor from uncertainty by addressing situations in which the debtor might receive a notification which did not contain a clear payment request. The view was expressed that the term "unconditional" was unnecessary, since an "unconditional" notification would not meet the requirements of subparagraph (b), namely, reasonable identification of the receivables and of the person to whom the debtor should pay. In addition, it was pointed out that the term "unconditional" could introduce some uncertainty since it was not universally understood.

117. While the view was expressed that the term "unconditional" might not be absolutely clear, it was observed that there was a need in case of a multiplicity of notifications to minimize the confusion to the debtor by rendering ineffective those notifications that were "conditional" in the sense that they notified the debtor of an assignment without, however, including a clear request for payment. In order to address that concern, the suggestion was made that subparagraph (b) could be revised in order to make it clear that a notification should include an unequivocal designation of the person to whom the debtor should make payment. After discussion, the Working Group agreed that the term "unconditional" could be deleted, subject to the preceding suggested revision of subparagraph (b).

"writing"

118. There was general agreement in the Working Group that for reasons of certainty notification of assignment should be in writing. At the same time, the Working Group agreed that, in order to accommodate modern means of communications, a flexible definition of writing should be adopted along the lines of paragraph (4), which was based on articles 2(a) and 5 of the draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange and Related Means of Communication.

"by the assignee with the assignor's authority"

119. Views were exchanged as to whether the assignee should be able to notify the debtor on its own without being given authority by the assignor to do so. It was noted that paragraph (2), as presently drafted, provided that notification could be given by the assignor or by the assignee with the assignor's authority. It was also noted that that approach, which was followed in article 8(1)(a) of the Factoring Convention, was intended to protect the debtor from the uncertainty as to whether the person notifying the debtor was the rightful creditor.

120. One view was that, in order to protect the debtor from uncertainty as to whom to pay, it was important to relate the notification to the contractual partner with whom the debtor was familiar, namely the assignor. As to the question of "authority" of the assignee to notify, it was stated that the interests of the assignee in this respect were adequately addressed in draft article 7 dealing with the breach of the financing contract, which provided that the assignee could notify the debtor "when agreed" or in case of failure of the assignor to perform the underlying receivables financing contract.

121. Another view was that subjecting the ability of the assignee to give notification to authorization by the assignor might create problems in case the assignor refused, or was unable, to give such authority to the assignee, since, for example, the assignor, subsequent to the assignment, might have been declared insolvent. In support of that view, it was pointed out that draft article 7 might not be sufficient in that the assignor and the assignee might have inadvertently failed to indicate in their agreement when the assignee may notify independently and in that, in case of sale of receivables, the assignee might have an interest in notifying irrespective of the assignor's failure to perform the underlying financing contract. In addition, it was stated that paragraph (3) could address the need to protect the debtor from the uncertainty as to whether the assignee notifying was the rightful assignee, since the debtor, if in doubt, could request the assignee to provide adequate proof of the assignment.

122. The Working Group agreed that, in order to address the concerns that had been raised, paragraphs (2)(a) and (3) should be linked more closely. It was noted that the revised text should provide for a right of the assignee to notify the debtor independently and, at the same time, for a right of the debtor, if it wished, to request from the assignee, adequate proof of the assignment. However, the attention of the Working Group was drawn to the need to avoid placing on the debtor the burden of having to request additional proof or the risk of misjudging the facts and having to pay twice. In addition, a note of caution was struck that combining paragraphs (2)(a) and (3) might inadvertently lead to restricting the situations in which the debtor would have a right to request additional information only to situations involving independent notification by the assignee.

Subparagraph (b)

123. In line with the decision of the Working Group in its consideration of draft article 4 dealing with bulk assignments that future receivables could be assigned, provided that they could be identified as receivables to which the assignment related, it was agreed that the notification should not necessarily have to identify the receivables in completely exact terms. However, some concern was expressed as to whether the words "reasonably identified" properly conveyed that message, in particular in view of the fact that the term "reasonably" might not be universally understood. Although the suggestion was made that this term should be deleted or replaced by a clearer term, it was generally felt that it could be retained, so as to accommodate the case of future receivables, which could not be identified in exact terms, and for consistency in terminology with the Factoring Convention. As a drafting matter, it was suggested that the word "the assignee" should be replaced by a more general reference to "person". Subject to the observation referred to in paragraph 117 above, the Working Group found the substance of subparagraph (b) acceptable.

124. Upon concluding its consideration of paragraphs (2) and (3), the Working Group considered an additional question, namely, whether notification of the debtor should relate only to receivables arising from contracts existing at or before the time of notification, a limitation found in article 8(1)(c) of the Factoring Convention.

125. The view was expressed that, if such a rule were adopted, notification relating to future receivables arising from contracts concluded after notification would not constitute part of the notification, and, as a result, the debtor would not be under a duty to pay the assignee in respect of such receivables. It was pointed out that such an approach would be particularly undesirable since it could result in curtailing a number of important receivables financing practices, and, for that reason, the Working Group chose not to incorporate such a limitation.

Paragraph (4)

126. It was recalled that paragraph (4) was modelled on articles 2(a) and 5 of the draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange and Related Means of Communication, which established the functional equivalent of "writing" in an electronic environment. The Working Group found paragraph (4) to be generally acceptable.

Paragraph (5)

127. With respect to the opening words of paragraph (5) ("Irrespective of whether the assignment is in writing or not"), it was noted that the draft provision had been formulated on the assumption that the draft uniform rules would not impose any form requirement on assignments. In view of the deliberations of the Working Group regarding the issue of form of assignment (see paras. 75-79 above), it was noted that paragraph (5) might need to be redrafted to reflect the variants to be prepared on that issue.

128. As regards the substantive rule contained in paragraph (5), there was general agreement that the main purpose of the paragraph was to avoid burdening parties with a duty to notify the entire contract of assignment. The minimum acceptable content of "notification in writing", as stated in paragraph (2), was a written statement as to the existence of the assignment, which should clearly identify the assigned receivables and the person to whom the debtor should pay. As a matter of drafting, it was generally felt that the reference to the minimum conditions established in paragraph (2) should be made more explicit.

Paragraph (6)

129. Various views were expressed in favour of total or partial deletion of paragraph (6). Under one view, paragraph (6) merely stated the obvious and, for that reason, should be deleted. Another view was that paragraph (6) should be deleted in line with a suggestion that had been made not to include in the draft uniform rules provisions on private international law issues (see paras. 185-187 below). Yet another view was that the reference to "other applicable law" at the end of paragraph (6) might lend itself to misinterpretation in that it might be confused with a reference to the rules of private international law. In line with that view, it was suggested that the words "or to other applicable law" should be deleted from paragraph (6).

130. It was widely felt, however, that a provision along the lines of paragraph (6) would be needed, since the discharging effect of payment should be recognized by the draft uniform rules. As to the exact way in which that issue should be addressed, it was noted that paragraph (1), which dealt with the option given to the debtor to pay the assignor, expressly mentioned that discharge would result from payment to the assignor. Paragraph (2) did not mention such a discharge in the case where payment was made to the assignee after the debtor had received notification of the assignment. It was suggested that a reference to that effect might be inserted in paragraph (2).

131. The view was expressed that, although the above-suggested references to discharge of the debtor in paragraphs (1) and (2) might be helpful, they might not sufficiently clarify the issue of discharge under the draft uniform rules. For example, in a situation where the debtor knew of the

assignment although it had not received notification and chose to pay the assignee, a situation discussed in the context of paragraph (1), the question of discharge would remain unsettled. Furthermore, it was stated that a general reference to the possibility of obtaining discharge on legal grounds outside the draft uniform rules was essential to avoid creating the risk that the discharge mechanisms established by the draft uniform rules might be misinterpreted as being exclusive. It was noted that the words "Irrespective of any other ground on which payment by the debtor to the factor discharges the debtor from liability" had been included in article 8(2) of the Factoring Convention for that reason. A suggestion was made that wording along the same lines might be considered for insertion in the draft uniform rules. After discussion, the Working Group agreed that the revised text to be prepared should deal with the discharging effects of payment by the debtor to the assignee under the draft uniform rules, without excluding other grounds on which the debtor paying the assignee might be discharged.

2. Defences of the debtor and setoff

132. The Working Group considered the question of defences of the debtor, based on a draft article, which read as follows:

> "Draft article 10. Defences of the debtor
>
> "(1) In a claim by the assignee against the debtor for payment of the assigned receivables, the debtor may set up against the assignee all defences arising under the original contract of which the debtor could have availed itself if such claim had been made by the assignor.
>
> "(2) Notwithstanding paragraph (1), defences that the debtor could have exercised against the assignor for breach of a no-assignment clause are not available to the debtor against the assignee.
>
> "(3) The debtor may assert against the assignee any right of setoff in respect of claims existing against the assignor in whose favour the receivable arose and available to the debtor at the time notification of assignment conforming to article 9 was given to the debtor."

Paragraph (1)

133. Broad support was expressed in favour of paragraph (1), which reflected a principle considered essential for the debtor's protection in the context of receivables financing, namely, the principle that the debtor's legal position should not be negatively affected as a result of the assignment.

Paragraph (2)

134. Concerns similar to those raised in the context of the Working Group's discussion of paragraph 2 of draft article 4 (no-assignment clauses) were raised with regard to paragraph (2) of this article (see paras. 66-68 above). In addition, the view was expressed that paragraph (2), as presently drafted, would not protect the assignee from defences raised by the debtor on the basis of tortious breach of contract. It was suggested that the debtor should have against the assignee

defences based on tortious breach of the original contract by the assignor, if domestic law so provided. The view was expressed that that problem would be resolved if the text to be prepared were to include a provision invalidating no-assignment clauses, though the Working Group, it was recalled, had not generally rallied around the inclusion of such a provision at an earlier stage of the discussion (see paras. 67-68 above). The Working Group agreed that paragraph (2) should be revisited at a later stage in the light of a revised draft provision on no-assignment clauses.

Paragraph (3)

135. While paragraph (3) was found to be acceptable in principle, a number of questions were raised. One question was whether it was necessary to limit the right of setoff of the debtor against the assignee to those rights existing at the time of notification. In response, it was stated that this approach was necessary in order to protect the assignee from dealings between the assignor and the debtor of which the assignee had no knowledge. It was added that that result was particularly desirable from the standpoint of practices in which a multiplicity of lenders financed receivables arising from the same contract or in which one lender financed a multiplicity of contracts between certain parties. Another question was whether the debtor receiving notification should be obliged to make its defences known to the assignee. Yet another question went to the content of a right of setoff, a matter on which legal systems differed widely. In that connection, it was observed that setoff might be left to national law, in view of its complexity and the fact that it was clear in private international that the law applicable to setoff was the law governing the receivables to which the assignment related.

3. Waiver of defences

136. The Working Group considered the question of waiver by the debtor of its defences relating to the original contract between the assignor and the debtor on the basis of a draft article, which read as follows:

> "Draft article 11. Waiver of defences
>
> "A waiver by the debtor of the defences that the debtor could raise against the assignee under article 10 shall be valid [in respect of defences the availability of which the debtor knew or ought to have known at the time of waiver]."

137. The Working Group noted that waivers by debtors of defences relating to the original contract constituted an important potential source of greater certainty for creditors in the context of receivables financing. The Working Group then went on to consider several aspects of the above draft provision.

138. One matter considered was whether the provision should specify the point of time at which such a waiver would be made. The suggestion in this regard was to refer to waivers taking place at the time of the conclusion of the original contract between the debtor and the assignor. It was reported that that was typically the point of time at which a waiver was made by the debtor, and that such timing was instrumental in determining the credit terms that the assignee could make

available to the assignor, which in turn could affect the credit terms offered to the debtor. It was noted, however, that there were cases in practice, not necessarily infrequent, in which a waiver would be made, or an earlier waiver modified, subsequent to the conclusion of the original contract between the debtor and the assignor. There was no reason, it was agreed, to preclude such practices.

139. A suggestion was made to include in the draft provision reference to the notion of "acceptance" of the assignment by the debtor. It was suggested that such a step, which might be introduced as an option rather than as a requirement, could be appropriate for the case of a single receivable, though it was unlikely to be feasible in the case of a bulk assignment involving a multiplicity of debtors. The rationale behind such an acceptance was to provide a technique for heightening for the assignee the degree of certainty surrounding an assignment of receivables, thereby increasing the utility of assignment of receivables as a financing tool.

140. It was reported that there were divergent views in practice as to the effect of such an acceptance. One was that the acceptance involved the effectiveness of the waiver itself, while another view was that the acceptance was merely an acknowledgment of the waiver. The concern was also expressed that including a reference to acceptance by the debtor could potentially compromise the utility of a provision recognizing the effectiveness of waivers of defences.

141. A similar concern was expressed with respect to the bracketed language at the end of the draft provision, limiting the waiver to defences that the debtor knew or ought to have known about at the time of the waiver. It was felt that such a reference would inject an undesirable degree of uncertainty and subjectivity and would perhaps place the assignee into the undesirable position of having to investigate the question of the knowledge possessed by the debtor, which would have an adverse impact on the cost of credit.

142. In the discussion, the question was raised whether a waiver of defences was "final" or, in other words, "irrevocable". In response, the Working Group expressed its understanding that, in order to have commercial utility and to provide legal certainty, a waiver should be deemed final or irrevocable. It was pointed out that such an understanding was necessitated by the fact that credit extended on the basis of an assignment of receivables often relied on a waiver of defences. The view was expressed that the attribute of irrevocability could usefully be clarified in the text.

143. From a drafting standpoint, a proposal was made to add a reference to the waiver as being "explicit". Another proposal was to refer to waivers as being "admissible", rather than using the word "valid", so as to avoid inadvertently giving the impression that the provision was intended to deal with the question of validity of a waiver of defences.

144. The attention of the Working Group was drawn to the fact that article 30(1)(c) of the United Nations Convention on International Bills of Exchange and International Promissory Notes exempted from the protection afforded to the protected holder instances such as those involving fraud and duress. It was suggested that the present text should not afford the assignee greater protection in such cases than that afforded to the protected holder by the above Convention. Support was expressed for such an understanding of the provision, which would exclude from the debtor's waiver of defences those of the type related to fraud or duress. Reference was made in this connection to the understanding expressed above that the text was not intended to override other applicable law dealing with questions of validity of a waiver of defences.

4. Recovery of advances

145. The Working Group engaged in a discussion of recovery of advances paid by the debtor to the assignee on the basis of a draft article, which read as follows:

> "Draft article 12. Recovery of advances
>
> "Without prejudice to the debtor's rights under article 10, non-performance or defective or late performance of the original contract by the assignor shall not by itself entitle the debtor to recover a sum paid by the debtor to the assignee, provided that the debtor has a right to recover that sum from the assignor."

146. The Working Group lent its support to the approach embodied in the above provision, according to which the debtor should not be able to recover advances paid to the assignee prior to performance by the assignor of the original contract merely because of failure in performance by the assignor. It was noted that the draft provision did not include exceptions to the rule of the type included in the comparable provision of the Factoring Convention (art. 10). Those exceptions included the case in which the assignee had not paid or loaned money to the assignor as required in the financing contract, and the case in which the assignee was aware of the assignor's failure in performance of the original contract. It was understood that exceptions of that type were peculiar to the specific case of factoring, in which it was typical for a guarantee of performance to be given by the factor, and that reflecting them in the general text being prepared would create obstacles to a variety of financing structures used in practice.

147. It was also noted that the general approach in the current text, which was acceptable to the Working Group, was that the debtor, after the assignment, would still be left with its remedies against the assignor, and that it was not necessary to add to those remedies a remedy against the assignee.

148. The Working Group then considered the proviso at the end of the draft provision, which preserved a remedy for the debtor to obtain from the assignee return of advances paid in the face of failure in contract performance by the assignor where no remedy would be available against the assignor. The Working Group felt that it would be preferable to affirm separately and positively a rule to the effect that the debtor was entitled to obtain from the assignor the amount of advances paid to the assignee.

K. Effects of assignment towards third parties

149. The Working Group engaged in a discussion of the effects of assignment on third parties, based on a draft article, which read as follows:

"Draft article 14. Priorities

"(1) Variant A

The first assignee has priority over subsequent assignees, the assignor's creditors [and, subject to the applicable insolvency law, over the trustee in the insolvency of the assignor] with regard to the assigned receivables.

Variant B

The first assignee to notify the debtor in accordance with article 9 has priority over subsequent assignees, over earlier assignees who failed to notify or notified later, over the assignor's creditors [and, subject to the applicable insolvency law, over the trustee in the insolvency of the assignor] with regard to the assigned receivables.

Variant C

The first assignee to register a summary statement at a public register located in the place of business of the assignor, which reasonably identifies the assignor, the assignee and the assigned receivables, has priority over subsequent assignees and earlier assignees who failed to register or registered later, the assignor's creditors [and, subject to the applicable insolvency law, over the trustee in the insolvency of the assignor] with regard to the assigned receivables.

Variant D

The first assignee, or the first assignee to notify the assignment to the debtor, or the first to register a summary statement thereof in a public registry will have priority over subsequent assignees and the assignor's creditors, depending on the law of the State where the [assignor] [debtor] has its place of business.

"(2) The rule of paragraph (1) does not apply in the following cases:

....."

Paragraph (1)

General remarks

150. It was noted, at the outset, that assignment as a means of transferring property in receivables might have effects towards third parties, such as several conflicting assignees, the assignor's creditors and the trustee in the insolvency of the assignor. A conflict of priorities might arise in two main situations. One was the situation of a conflict between several assignees, due to multiple assignments of the same receivables because of fraud or an unconscionable act of the assignor. The other was the situation of a conflict between the assignee and the assignor's creditors, including the trustee in the insolvency of the assignor. While it was generally agreed that the possibility of receivables being fraudulently assigned to more than one assignee needed to be addressed in the

draft uniform rules, the discussion focused on the situation where the assignor became insolvent, a situation raising particularly serious concerns in assignment practice.

151. The view was expressed that, when dealing with issues of priorities, whether by way of a registration mechanism or by relying on a system of notification, the draft uniform rules should seek to establish that the assignee would be accorded the status of a secured creditor for the purposes of the insolvency proceedings. While it was felt that such a result might be desirable for fostering financing through assignment of receivables, it was suggested that it might not be feasible. On the one hand, the disparities in the status of secured creditors under existing rules of domestic law and the existence of administrative law and public policy considerations would make it impossible for the draft uniform rules to refer merely to the status of secured creditors under domestic law. On the other hand, any attempt to create a uniform status of secured creditors in the draft uniform rules would be faced with the same administrative law and public policy considerations and might greatly jeopardize the acceptability of the draft uniform rules. After deliberation, it was agreed that the status of an assignee in the context of insolvency proceedings might need to be further discussed at a future session, particularly in view of the work undertaken by the Working Group on Insolvency Law.

152. It was noted that legal systems differed as to whether the effects of assignment towards third parties arose from the assignment itself or depended upon an additional act, such as notification of the debtor or registration of the assignment, which was reflected in the variants presented. Variant A provided a simple rule, which, however, had the disadvantage that it afforded very little or no protection to third parties; Variant B raised difficulties since third parties would need to identify the debtors in order to obtain information about possible assignments, which could involve considerable difficulty in particular in the context of receivables financing; Variant C was based on an adequate publicity system, which allowed third parties a considerable degree of certainty and predictability as to whether they would be able to rely on receivables in deciding to extend credit while it raised the question of feasibility of establishing an international registration system; and Variant D in effect provided a private international law rule based either on the place of business of the assignor or on the place of business of the debtor.

153. The Working Group engaged in a general exchange of views. It was generally agreed that an adequate publicity system was essential for an efficient legal framework for receivables financing. It was stated that uncertainty with regard to the issue of priorities would increase the risk of the assignee not being able to obtain payment, which in turn would have an impact on the cost of credit. As a result, the assignee would have to pass that cost to the assignor and the assignor to the debtor. It was also stated that an adequate publicity system was essential to ensure access of small and medium-sized businesses to international financial markets.

Variants A to D

154. As to what might constitute an adequate publicity system, the Working Group based its deliberations on the text of the variants. Some support was expressed in favour of Variant A; it was stated that a rule giving priority to the first assignee (in actual time) had the advantage of simplicity. Should such an approach be followed, third parties would tend to be protected by the general knowledge that they possessed about receivables financing contracts in the relevant market. Some support was also expressed in favour of Variant B. It was stated that various jurisdictions followed a "first to notify the debtor" rule. The view was expressed, however, that a drawback of

such an approach was that it, in effect, utilized the debtor as a registry of notifications. While no support was expressed in favour of Variant D, it was generally felt that it should not be deleted at this stage and that the merits of an approach based on private international law mechanisms might need to be reviewed at a later stage.

155. Support was expressed in favour of a registration mechanism, such as envisaged in Variant C. It was stated that a rule based on registration would have the advantage of providing a system of notice to third parties, with the effect that the first assignee to register would have priority. The assignee would prevail over the assignor's creditors if the registration was effected before attachment, and, subject to the applicable insolvency law, over the insolvency trustee if registration was effected before the opening or effect of the insolvency proceedings.

156. However, a number of concerns were expressed with respect to the adequacy of a registration system. One concern was that in some countries the concept of registration of assignments might not be acceptable. In response, it was stated that, while registration might be objected to on theoretical grounds, it would have to be considered in view of the potential it presented for increasing the amount of credit available based on receivables and the number of parties having access to such credit. Another concern was that the costs involved in a registration system might constitute an obstacle to its use by smaller businesses. In response, it was pointed out that the use of electronic technology in recent years had considerably reduced the costs of using registration systems. It was also pointed out that, under the current draft provision, only a summary statement had to be registered, thereby avoiding costs that might result, for example, from an obligation to register the details of each assignment. Yet another concern was that, in a number of practical situations, parties might not be willing to make use of a registration system. Such situations involved, for example, certain short-term transactions concluded for refinancing purposes, where the assignment was concluded for only a few hours or a few days. Another example was the situation where parties might not wish to register with a view to preserving the confidentiality of the assignment. With respect to the latter example, support was expressed for a suggestion that the draft uniform rules should limit the right to access the registered information to interested parties.

157. In view of the possibility that parties might choose not to use a register, it was felt that, should a registration mechanism be established by the draft uniform rules, a specific provision should clarify the status of assignments that had not been registered. In particular, the draft uniform rules would need to make it clear whether registration was a condition of validity of the assignment or merely a way of evidencing the assignment and of settling the issues of priorities. In that respect, support was expressed for a suggestion that the draft uniform rules, while providing the option of a registration should not make the validity of the assignment conditional upon registration. According to that suggestion, an assignee that registered a summary statement would have priority over an assignee that failed to register or registered later. As a default rule, in the absence of a registration, the first assignee would have priority.

158. With regard to the question whether a publicity system should be based on an international registry or whether it should rely on existing national registries, preference was expressed in favour of an international registry. It was noted that an international registry could facilitate both registration and access to registered information, while a system based on national registers linked with an international communications system would not make registration easier, though it could facilitate access to registered information.

159. The view was expressed that the Working Group did not have sufficient information on the legal issues and the technical details (e.g., cost and manner of operation) involved in the establishment of a world registry. In that regard, it was noted that, while registration had been briefly dealt with in document A/CN.9/397 (paras. 43-51), the Secretariat was preparing a study on registration, which was relevant to the work of both the Working Groups on International Contract Practices and on Electronic Data Interchange. It was agreed that the discussion of registration issues would need to be resumed at a later stage, in view of the contents of that study. With regard to a world registry, a note of caution was struck that, while it could be acceptable if the instrument to be prepared were to cover assignments of international receivables, an attempt to cover international assignments of domestic receivables could create problems. It was also observed that the legal framework for a world registry would in all likelihood need to be established by way of a convention rather than a model law.

160. The Working Group was informed of work undertaken by UNIDROIT for the preparation of a draft convention on international interests in mobile equipment. It was observed that the draft convention would create a new international interest in mobile equipment, the effectiveness of which against third parties was intended to be based on international registration. It was also stated that a study group had been set up to consider issues related to that kind of registration. While coordination of work with UNIDROIT was said to be desirable, the view was widely shared that registration of interests in mobile equipment of the type envisaged in the UNIDROIT project presented different legal and practical issues from registration of assignments of receivables.

Paragraph (2)

161. It was noted that paragraph (2) was intended to allow for exclusion from a priority rule of certain special cases in which it might not be appropriate to afford preference to an assignee on the basis of some type of priority in time. The example was given of the seller who retained title to the goods sold until full payment of their price and who, at the same time, was the assignee of the future proceeds that might arise from the further sale of the goods by the buyer in the course of its business.

162. Differing views were expressed as to whether paragraph (2) should be retained. In support of retention of the paragraph, it was stated that the concept of priority was not useful in all cases and some exceptions would need to be listed (e.g., the conflict between a supplier of materials and a bank providing credit). As a drafting matter, it was suggested that, if paragraph (2) were retained, it should be made clear that the exclusions referred only to the rule in paragraph (1) and would not result in excluding in those cases the application of domestic law, even if the domestic law contained the same priority rule as in paragraph (1).

163. In support of deletion of paragraph (2), it was stated that such a provision ran the risk of compromising the certainty of a priority rule in paragraph (1) to the extent that cases would be left to the applicable domestic law, which could differ widely from country to country. In addition, it was pointed out that an approach based on a list of exclusions from the priority rule in paragraph (1) would result in decreased predictability as to which assignee would be afforded priority, which would result in an increase in the cost of credit to the assignor and ultimately to the debtor. Moreover, such exclusions were said to be inappropriate since they might have a negative impact on practices in which credit might be extended to a seller in reliance on the receivables. It was suggested that, instead of listing excluded cases such as those in which a conflict of priority arose

between a supplier of materials and a bank, a priority rule should be devised to provide that, for example, the supplier should inform the bank in order to enable it to avoid providing credit to the seller on the basis of the receivables assigned to the supplier.

164. Moreover, it was observed that a provision along the lines of paragraph (2) would raise the difficulty of having to classify claims in terms of special categories other than priorities (e.g., "privileges"), a task which should be left to the applicable domestic law. In the same vein, the suggestion was made that conflicts of priority between several assignees should be distinguished from conflicts between the assignee and the assignor's creditors, which could include Government revenue claims and employee wage claims. In that connection, it was noted that it should be made clear that the draft uniform rules were not intended to enter into the field of classification of claims or to cover revenue or wage claims.

L. Subsequent assignments

165. The Working Group engaged in a discussion of subsequent assignments, namely assignments by the initial or any subsequent assignee and several assignments of the same receivables by the assignor based on a draft article, which read as follows:

"Draft article 15. Subsequent assignments

"(1) These rules apply to any assignment of the same receivables by the assignor to several assignees or by the first or any other assignee to subsequent assignees, provided that the [first] [such] assignment is governed by these rules.

"(2) In case of subsequent assignments by the assignor, the debtor is discharged from liability by payment to the first assignee to notify under article 9 and has against the assignee the defences provided for under article 10.

"(3) In case of subsequent assignments by the first or any subsequent assignee, the provisions of articles 9 to 12 apply as if the subsequent assignee were the first assignee. However, the debtor may not assert against a subsequent assignee rights of setoff in respect of claims existing against an earlier assignee.

"(4) Any subsequent assignment by the first assignee or by any subsequent assignee shall be effective notwithstanding any agreement between the first assignor and the first assignee or between any of the subsequent assignees prohibiting or restricting such assignment.

"(5) Subject to the provisions of article 9, the invalidity of an intermediate assignment renders the final assignment invalid."

Paragraph (1)

166. It was generally felt that paragraph (1) reflected the sound principle of perpetuatio juris, namely that a succession of assignments should be covered by the same rules. However, it was noted that paragraph (1) referred to different cases of subsequent assignments, including those made by the initial or any subsequent assignee for refinancing purposes ("successive assignments"), as

well as those made by the assignor to several assignees because of fraud or an unconscionable act ("dual assignments").

167. The view was widely shared that successive assignments should be the subject of paragraph (1), and that the question of dual assignments should be dealt with separately. In addition, the view was expressed that fraudulent or unconscionable assignments by the assignor to two or more assignees essentially raised an issue of priority or of validity since after the initial assignment the assignor had no longer the right to assign the receivables.

168. The question was raised whether assignments of distinct parts of a pool of receivables or of undivided interests in pools of receivables by the same assignor to several assignees should be covered (e.g., assignments in which the claim for the capital of a loan was assigned to one assignee while the claim for the interest was assigned to another). It was noted that the definition of "receivables" could be revised so as to include parts of receivables. However, in view of the highly specialized context of refinancing transactions in which such assignments took place, it was suggested that further consideration would have to be given as to whether the assignment of partial or undivided interests in receivables should be addressed in the draft uniform rules (see paras. 180-184).

Paragraph (2)

169. It was noted that paragraph (2) addressed the issue of the debtor's protection in case of multiple notifications of dual assignments by several assignees. The Working Group found paragraph (2) to be acceptable in that the debtor could not be required to determine which of several assignees had priority and should have a simple and clear indication of whom to pay to discharge its obligation. As a matter of drafting, it was suggested that paragraph (2) should be aligned or consolidated with the revised paragraph (2) of draft article 9 on the debtor's duty to pay, so as to avoid any overlap.

Paragraph (3)

170. It was noted that paragraph (3) dealt with the debtor's protection in case of successive assignments by the initial or any subsequent assignee by adopting the principle that the debtor's legal position should neither be worsened nor improved as a result of a subsequent assignment.

171. A question was raised as to the appropriateness of the exclusion of rights of setoff that the debtor might have against an "earlier assignee". In response, it was explained that, based on paragraph (3) of draft article 10 dealing with defences of the debtor, the debtor had the right to setoff against a subsequent assignee claims arising against the initial assignor. It was added that, if a debtor could accumulate defences based on its separate dealings with various assignees in a chain of successive assignments, defences of which the ultimate assignee would have no way of knowing, this would adversely affect the commercial utility of subsequent assignments. The view was expressed that the debtor should be given the right to setoff against the assignee demanding payment claims arising from the debtor's contracts with the immediately preceding assignee who was at the same time the final assignor. The widely shared view, however, was that such an approach would not be desirable since it could inadvertently result in increasing the risk that the

assignee might not be able to collect, thus affecting the cost of credit, and in unnecessarily improving the debtor's legal position.

172. Another question was whether the subsequent assignee should follow the same procedure for establishing priority as would be imposed on the initial assignee. The concern was expressed in that regard that the present wording of draft article 14 dealing with priorities might not sufficiently cover multiple notifications or multiple registrations by subsequent assignees, and the suggestion was made that the matter should be clarified.

173. After deliberation, the Working Group found the substance of paragraph (3) to be generally acceptable, subject to further consideration at a future session of the Working Group.

Paragraph (4)

174. It was noted that, in line with the approach taken in draft article 4 regarding no-assignment clauses agreed upon between the assignor and the debtor in the original contract, paragraph (4) provided that subsequent assignments for refinancing purposes in contravention of no-assignment clauses agreed upon between the assignor and the initial assignee or between any of the subsequent assignees, were effective. Differing views were expressed as to whether no-assignment clauses included in refinancing contracts should be treated in the same way as no-assignment clauses agreed upon between the assignor and the debtor in the original contract.

175. One view was that for the same reasons mentioned in the Working Group's discussion of draft article 4, paragraph (4) should also be subject to a reservation by States (see paras. 62-65 above). In that regard, the question was raised whether the draft uniform rules should include a provision along the lines of article 12 of the Factoring Convention, which provided that the Convention did not apply to a subsequent assignment which was prohibited by the terms of the factoring contract. In response, it was noted that article 12 of the Factoring Convention was introduced to meet the needs of a particular jurisdiction in which receivables that had already been assigned could not be assigned validly a second time. It was recalled that, in that jurisdiction, factoring contracts routinely contained a clause whereby the factor undertook not to reassign the receivables; in order to avoid, in the context of international factoring, that the export factor would have to assign the assigned the receivables a second time to the import factor, the assignor assigned the receivables directly to the import factor in the State in which the debtor had its place of business.

176. After deliberation, the prevailing view was that paragraph (4), as presently formulated, was acceptable. It was pointed out that there was no reason to follow a reservation approach since, while upholding no-assignment clauses contained in the original contract between the assignor and the debtor was considered in some countries as a matter of public policy, this was not the case for no-assignment clauses agreed upon in the context of refinancing transactions, in which subsequent assignments were normal practice. In addition, it was stated that it was not necessary to introduce a provision along the lines of article 12 of the Factoring Convention, since assignments under the draft uniform rules differed from the factoring contract, which was a contract based on the close relationship between the assignor and the factor, and in the context of which subsequent assignments were normally not effected for refinancing purposes.

177. The view was expressed that paragraph (4) should include a rule on the consequences of the breach of no-assignment clauses along the lines of paragraph (2) of draft article 4, which would

mean in effect that a possible liability of an assignee assigning the receivables further, despite the fact that it had agreed with its immediately preceding assignor not to do so, would not be affected by the rule in paragraph (4).

178. After deliberation, the Working Group found the substance of paragraph (4) to be acceptable along its present lines.

Paragraph (5)

179. The Working Group agreed with the principle reflected in paragraph (5) that invalidity of an intermediate assignment rendered the following assignments invalid. As a matter of drafting, it was suggested that the opening words of paragraph (5) might be revised so as to avoid giving the impression that notification of the debtor cured the invalidity of a subsequent assignment. The suggestion was also made that paragraph (5) should be revised so as to reflect the idea that the invalidity of an intermediate assignment could invalidate all following assignments and not only the "final" assignment, as presently formulated.

M. Assignments of partial or undivided interests in receivables

180. In the discussion of draft article 15 dealing with subsequent assignments, the question arose whether assignments of distinct parts of receivables or of undivided interests in pools of receivables should be covered by the draft uniform rules (see para. 168 above).

181. At the outset, it was observed that such assignments often formed part of highly complex financing transactions and raised a number of difficult issues that needed to be examined carefully in order not to upset existing practices, which varied widely. One example given referred to loan participations, in which undivided interests, usually in large loans, were sold to different financing institutions for the purpose of spreading the risk involved. Another example cited was securitization, which also involved the assignment of undivided interests in receivables, although for a different purpose, namely, to decrease the cost of credit by converting the receivables into securities and making them available to the investment market.

182. It was widely felt that the above types of assignments merited further consideration with a view to determining whether or how they should be addressed in the draft uniform rules.

183. As to the particular questions that may need to be considered, a number of suggestions were made, including: the definition of "parts" of receivables, or the minimum units, that could be assigned; the debtor's protection, in particular the question whether the debtor's consent was necessary for such an assignment to be effective and whether the debtor should be able to discharge its debt by depositing the amount owed in a bank account or by mailing it to a post box office; the assignee's protection from creditors of the assignor; the possible exclusion of receivables in the form of negotiable instruments; and the extent to which it would suffice, in order to cover such assignments, to revise the definition of "receivable" so as to include partial or undivided interests in receivables, coupled with the application to such cases of the draft uniform rules being prepared.

184. Further questions were raised with regard to transactions such as loan participations and securitization, including whether both types of transactions could be addressed by the same rules

and whether a criterion could be found to distinguish the undivided investment interest in a loan participation, that could be covered, from investment securities that were subject to a different regulatory regime and would presumably not be covered.

N. Private international law issues

1. General remarks

185. A question was raised as to whether the Working Group had the mandate to discuss issues of private international law in the context of the preparation of the draft uniform rules. In response, it was recalled that the Commission, at its twenty-eighth session, had taken the decision to assign the report prepared by the Secretariat and the draft uniform rules contained therein to the Working Group with a view to preparing a uniform law on assignment in receivables financing. As to the private international law aspects of assignment, it had been agreed at that session that the difficulty in addressing them should not result in their exclusion from future work of the Commission on the topic, but should rather lead to closer cooperation with the Hague Conference on Private International Law, for example, by the holding of joint meetings of experts on issues of common interest related to assignment of receivables.[5]

186. Views were exchanged as to whether it was appropriate to consider inclusion of provisions on issues of private international law in the body of the draft uniform rules. It was stated that, under an approach taken in some countries, it might be regarded as inappropriate for a text of substantive law to include rules on private international law issues governing its own applicability. It was stated in response that provisions on conflicts of laws had been included in previous UNCITRAL texts, without negatively affecting their applicability.

187. Another preliminary question was whether it was appropriate to discuss private international law issues in the context of the preparation of the draft uniform rules before agreement had been reached as to the substantive rules. It was generally agreed that, at this stage, the Working Group could only have a very tentative discussion on the basis of the draft provisions embodied in the draft uniform rules with respect to private international law, namely draft article 8 (law applicable to the relationship between assignor and assignee, draft article 13 (law applicable to the relationship between assignor and debtor) and Variant D of paragraph (1) of draft article 14 (priorities). It was felt, however, that, although private international law issues would need to be further discussed as the work on the substantive provisions of the draft uniform rules would progress, a preliminary exchange of views on those issues might be useful at this stage.

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[5] Report of the United Nations Commission on International Trade Law on the work of its twenty-eighth session (1995), Official Records of the General Assembly, Fiftieth Session, Supplement No. 17, A/50/17, paras. 379 and 380.

2. Law applicable to the relationship between assignor and assignee

188. The Working Group engaged in a discussion of possible rules on the law applicable to the relationship between assignor and assignee, based on draft a article, which read as follows:

"Draft article 8. Law applicable to the relationship between assignor and assignee

"(1) [With the exception of matters which are expressly settled in these rules,] the rights and obligations of the assignor and the assignee[, including the question of the point of time at which the assignee becomes the rightful creditor of the receivables,] are governed by the law the choice of which is:

(a) Stipulated in the assignment; or

(b) Agreed elsewhere by the assignor and the assignee.

"(2) (a) In the absence of a choice by the parties, the rights and obligations of the assignor and the assignee[, including the question of the point of time at which the assignee becomes the rightful creditor of the receivables], and with the exception of matters which are expressly settled in these rules, are governed by the law of the State in which the assignor has its place of business.

(b) For the purposes of subparagraph (a), in case the assignor has more than one place of business, the place of business is that which has the closest relationship to the assignment, having regard to the circumstances known to or contemplated by the assignor and the assignee at any time before or at the conclusion of the assignment."

Paragraph (1)

"[With the exception of matters which are expressly settled in these rules,]"

189. The view was expressed that the opening words of paragraph (1) created the impression that the draft uniform rules established a distinction between the general application of domestic law, which would be determined by a private international law rule, and certain provisions of the draft uniform rules, which would apply in abstracto with no regard to domestic law. It was stated that the draft uniform rules would either be in the form of a model law, in which case they would be enacted as domestic law and carry out their international effects through a private international law rule, or as a convention, which would determine its own scope of application. In response, it was stated that, while the opening words of paragraph (1) might need to be redrafted to avoid misinterpretation, they were intended mainly as a reference to draft articles 6 (warranties) and 7 (breach of the financing contract), which were the only provisions in the draft uniform rules dealing with issues related to the contract of assignment. As a matter of drafting, it was suggested that the opening words of paragraph (1) might be replaced by a reference to draft articles 6 and 7. In that context, it was also recalled that support had been expressed for the deletion of paragraph (1)(b) of draft article 1 so as to reduce uncertainty inherent in reliance on the rules of private international law regarding assignment.

190. A concern was expressed about a possible side-effect of the reference to "matters expressly settled in these rules". It was stated that relying on private international law to solve all matters not expressly settled in the draft uniform rules might detract from the main goal of the draft uniform rules, which was to provide uniform substantive solutions to the issues raised by receivables financing. While certain questions would undoubtedly have to be left to domestic law, with the inherent uncertainty and diversity as to the solutions to be provided, other questions, though not expressly settled by the draft uniform rules, might be settled better by reference to the principles on which the draft uniform rules were based or to trade custom or to other source of uniform law. A suggestion was made that the word "expressly" should be deleted. With reference to the principles on which the draft uniform rules were based, another suggestion was that a provision on interpretation along the lines of article 7 of the United Nations Sales Convention might be included. The view was expressed, however, that such a provision could only operate in the context of an international convention. Other examples included texts of international origin that allowed jurisdictions to apply general principles, trade custom, "lex mercatoria" or other standards developed internationally.

"the rights and obligations of the assignor and the assignee"

191. The view was expressed that the reference to "rights and obligations" of the parties to the assignment might overly restrict the scope of the draft provision. For example, it was stated that the time of transfer of the assigned receivables, while not falling strictly under the category of "rights and obligations" of the parties, was intended to be subject to the law applicable to that relationship. A suggestion was that the matter might be addressed by appropriate explanations in a commentary on the draft uniform rules, that might be possibly prepared at a later stage, with a view to broadening the scope of the notion of "rights and obligations" for the purposes of the draft uniform rules. Another suggestion was to replace the reference to the notion of "rights and obligations of the assignor and the assignee" by a reference to "the assignment". That suggestion was objected to on the grounds that such a reference would open too widely the scope of the draft provision, in that it would also cover the effects of the assignment in the context of the relationship between the assignee and the debtor, which were currently covered by draft article 13. After discussion, it was agreed that the provision would need to be redrafted to make it clear that it covered the relationship between the assignor and the assignee, including such issues as validity of the assignment and transfer of the assigned receivables as between the assignor and the assignee.

192. Another concern was that the reference simply to the "rights and obligations" of the parties left it unclear whether the rights and obligations to be taken into consideration were only those stemming from the assignment contract or also those originating from the underlying financing transaction. The view was expressed that this might not be an appropriate distinction since it might be regarded that the rights and obligations of the assignor and the assignee were not separable but themselves arose from the underlying financing transaction. However, it was observed that assignment clauses created distinct rights and obligations of the parties (e.g., warranties), apart from the rights and obligations stemming from the underlying transaction. After discussion, it was generally agreed that it should be made clear that the scope of the draft provision was limited to the relationship between the assignor and the assignee arising from the assignment.

"[, including the question of the point of time at which the assignee becomes the rightful creditor of the receivables,]"

193. There was general agreement that matters regarding time and validity of the transfer of the assigned receivable should not be affected by agreement between the parties. It was also agreed that the provision might need to indicate more clearly that it was not intended to override any provision of insolvency law.

"are governed by the law the choice of which is:

"(a) Stipulated in the assignment; or

"(b) Agreed elsewhere by the assignor and the assignee."

194. As to the substance of the private international law rule, there was general agreement on the need to recognize party autonomy. As a matter of drafting, the view was expressed that the reference to "the law the choice of which is agreed elsewhere" might need to be redrafted to indicate more clearly that it intended to cover any law chosen by the parties outside the contract of assignment itself. The provision should not be misinterpreted as interfering with any procedural law that might apply, in the context of certain domestic laws, as to where or when such a contract might be concluded by the parties. As a drafting suggestion, it was stated that subparagraphs (a) and (b) should be merged to read along the following lines: "stipulated in, or for the purposes of, the assignment".

Paragraph (2)

195. Various views were expressed as to the private international law rule that should apply in the absence of a choice by the parties. One view was that a rule based on the contract of assignment being governed by the law of the place of business of the assignor had the advantage of simplicity and predictability. However, such a rule was objected to on the grounds that it was inappropriate to provide for a fixed rule to apply to the wide variety of practical situations, in the various types of financing transactions to be covered by the draft uniform rules. For example, while the law of the place of business of the assignor might be appropriate in the context of a sale of receivables, the law of the place of business of the assignee might be preferable in case of a loan, where the characteristic performance would be performed by the assignee. In the discussion, the suggestion was made that paragraph (2) should apply also in cases in which the parties' choice of law was invalid.

196. Another view was that a rule based on the notion of "closest relationship" was preferable, along the lines adopted in the Rome Convention. Inherently more flexible, such an approach could result in the application of the law of the assignor's place of business (e.g., in an assignment by way of sale), or the law of the assignee's place of business (e.g., in recourse factoring in which the factor might perform bookkeeping and collection functions). That approach was objected to on the grounds that such a rule would have the disadvantage of reduced predictability. While support was expressed in favour of introducing a degree of flexibility in the choice-of-law rule, to reflect the variety of the situations encountered in practice, it was generally felt that the issue needed to be considered further at a future session of the Working Group.

3. Law applicable to the relationship between assignee and debtor

197. The Working Group then turned to a discussion of a possible rule on the law applicable to the relationship between assignee and debtor based on a draft article, which read as follows:

"Draft article 13. Law applicable to the relationship between the assignee and the debtor

"With the exception of matters which are expressly settled in these rules, any matter arising between the assignee and the debtor shall be governed by the law [governing the receivable to which the assignment relates.] [of the State where the debtor has its place of business. In case the debtor has more than one place of business, the place of business is that which has the closest relationship to the transfer of receivables, having regard to the circumstances known to or contemplated by the assignor and the assignee at any time before or at the conclusion of the contract.]"

198. It was noted that the above draft provision presented a choice for consideration by the Working Group between two possibilities, the law governing the receivable to which the assignment related (the law of the original contract) and the law where the debtor had its place of business. The tendency of the Working Group, at least at the present stage of its deliberations, was to favour the former approach, namely a rule referring to the law of the original contract. Views expressed in support of such an approach included that it would be more in line with the general approach of the draft uniform rules as they had been considered thus far and that it would provide greater protection to the debtor. The latter advantage was linked to the fact that the debtor would have chosen or at least acquiesced in the choice of the law governing the original contract. It was also suggested that a presumed advantage of the second approach, greater predictability due to being based on the place of business of the debtor, might be less than would appear since the debtor's place of business might not be known at the time of assignment or the debtor might relocate to another jurisdiction after the conclusion of the assignment. At the same time, the view was expressed that it would be premature at this stage to make a final decision as to which of the two approaches to follow.

199. As to the scope of the provision, the questions raised included whether the reference to "any matter arising between the assignee and the debtor" might be undesirably broad. A related matter was whether the question of the assignability of a receivable would be categorized as an issue between the debtor and the assignee, or one that perhaps might be considered as an issue of validity to be dealt with under the draft provision dealing with the law applicable to the assignor-assignee relationship. Observations made in regard to that question included that it did not relate to the question of admissibility of no-assignment clauses, and that in some countries the question of assignability may be dealt with as a question of the validity of the original contract. A further question raised was whether consideration should be given to including a reference to the contractual freedom for the parties to vary the rule set forth in the draft provision.

200. By way of a drafting suggestion, it was noted that the provision being considered at present, as well as paragraph (2)(b) of the draft article 8 (law applicable to the relationship between assignor and assignee), both identified the decisive place of business in the event that the party concerned in each of those provisions had more than one place of business. It was suggested that

those provisions might be consolidated in a single place in the text, perhaps in a provision containing general definitions.

201. Prior to closing for the present stage its discussion of applicable law questions, the Working Group recalled that Variant D of paragraph (1) of draft article 14 on priorities contained a reference to the law of the State of the place of business of either of the assignor or of the debtor, the two constituting a choice presented to the Working Group within that Variant. While some doubt was expressed as to the utility of Variant D, it was agreed to retain it for the time being for possible further consideration at a later stage.

IV. FUTURE WORK

202. Having concluded the above deliberations on various possible issues and draft provisions to be included in draft uniform rules on assignment in receivables financing, the Working Group noted a number of comments concerning the work accomplished at the current session and concerning the next steps to be taken. It was observed that the session had provided a productive exchange of views, including on various approaches and formulations that might be reflected in the draft uniform rules with a view to facilitating the development of global financial markets. A number of suggestions were made of issues for particular attention during the upcoming deliberations of the Working Group. Those included: the question of the international assignment of domestic receivables, with a particular view to providing adequate assurance of the protection of the debtor in such contexts (e.g., regarding new risks for the debtor; currency implications); the extent to which emphasis could be placed on finding solutions by way of substantive law, rather than through private international law rules; examination of the feasibility of relying on a registry approach; coverage of "conditional" and "possible" receivables; and compatibility of the draft uniform rules with national laws.

203. In connection with the above issues, reference was made to the relevance and utility of information, in particular regarding the experiences and needs of practitioners and other interested circles, that might be brought to the attention of the Working Group by the Secretariat, as well as by the members of the Working Group themselves as a result of consultations.

204. The Working Group requested the Secretariat to prepare a revised version of the draft uniform rules that had been considered at the present session, taking into account its deliberations and decisions. It was noted that the next session of the Working Group to be devoted to the subject of assignment in receivables financing was scheduled for 8 to 19 July 1996, those dates being subject to confirmation by the Commission at its twenty-ninth session.

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REPORT OF THE WORKING GROUP ON ELECTRONIC DATA INTERCHANGE (EDI) ON THE WORK OF ITS THIRTIETH SESSION
(Vienna, 26 February-8 March 1996)

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Annex

Text proposed for addition to the draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication

(as approved by the UNCITRAL Working Group on Electronic Data Interchange at its thirtieth session, held at Vienna, from 26 February to 8 March 1996) 31

INTRODUCTION

1. Pursuant to a decision taken by the Commission at its twenty-fifth session [1], in 1992, the Working Group on Electronic Data Interchange devoted its twenty-fifth to twenty-eighth sessions to the preparation of the draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange and Related Means of Communication (reports of those sessions are found in A/CN.9/373, 387, 390 and 406). The text of the draft Model Law, together with a compilation of comments by Governments and interested organizations (A/CN.9/409 and Add. 1 to 3) was placed before the Commission at its twenty-eighth session for review and adoption.

2. At its twenty-ninth session, the Working Group considered a draft Guide to Enactment of the Model Law (the report of that session is found in A/CN.9/407). The Working Group also considered in the context of a general debate on possible future work the issues of incorporation by reference and of negotiability of rights in goods in an electronic environment. As regards incorporation by reference, the Working Group had before it two proposals for a draft provision, one submitted by the observer for the International Chamber of Commerce (A/CN.9/WG.IV/WP.65) and another submitted by the United Kingdom of Great Britain and Northern Ireland (A/CN.9/WG.IV/WP.66). After discussion, the prevailing view was that the issue of incorporation by reference was not mature for inclusion in the Model Law and deserved further study. A view was expressed that the issue should be addressed in the context of future work on negotiability of rights in goods (A/CN.9/407, paras. 100 to 105).

3. With respect to the issues of negotiability and transferability of rights in goods in an EDI context, the Working Group had before it two brief notes, one submitted by the United Kingdom of Great Britain and Northern Ireland (A/CN.9/WG.IV/WP.66) and another submitted by the United States of America (A/CN.9/WG.IV/WP.67).

4. It was noted that the functions of bills of lading that might be affected by the use of EDI communications included those of serving: (1) as a receipt for the cargo by the carrier; (2) as evidence of the contract of carriage with regard to its general terms and the particular details of vessel, loading and discharge ports, and nature, quantity and condition of the cargo; and (3) as a document giving the holder a number of rights, including the right to claim and receive delivery of the goods at the port of discharge and the right to dispose of the goods in transit.

5. The first two functions could be easily performed by EDI since the receipt for the cargo and information about the contract of carriage could be given by means of data messages such as the UN/EDIFACT messages. However, the third function (as document of title) raised difficulties in an EDI environment since, in the absence of a single piece of paper, it was difficult to establish the identity of the exclusive holder to whom the carrier could deliver the goods without running the risk of being faced with a claim by another party for misdelivery. In that regard, the Working Group noted that a central problem in the use of EDI bills of lading was to guarantee the singularity, or uniqueness, of the message to be relied upon by the carrier for delivering the goods. While any data message could probably be rendered unique through the use of cryptography, the possibility that the message might be fraudulently or mistakenly multiplied could not be excluded. The Working Group noted that solutions to that problem might be found in security, time-stamping or similar techniques or through a central registry in which the holder could register its rights.

6. The Working Group also noted that work on negotiability and transferability of documents of title

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[1] Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17 (A/47/17), paras. 140-148.

in goods by EDI means could include establishing a preliminary list of areas of commercial practice to be covered, validating agreements for negotiability and transferability of rights in goods through EDI, establishing criteria for parties to be holders in due course for the transfer of rights in goods or subsequently to negotiate such rights through EDI, determining the effect of negotiation of documents of title in EDI, establishing default rules for allocation of risk and electronic registries. With regard to electronic registries, it was noted that they could be governmental, central or private. The purpose, the access, the administrator, the costs, the insurance, the allocation of risks and the security could vary depending on the nature of the registry.

7. The Working Group engaged in a general debate, with a view to identifying the scope of possible future work and issues that could be addressed. With regard to the scope of future work, one suggestion was that the work should cover multimodal transport documents of title since they essentially fulfilled the same functions and raised similar issues. Another suggestion was that, while work could include transport documents of title in general, particular emphasis should be placed on maritime bills of lading since the maritime transport area was the area in which EDI was predominantly practised and in which unification of law was urgently needed in order to remove existing impediments and to allow the practice to develop.

8. In support, it was pointed out that EDI messaging was currently restricted to the exchange of information messages in the North Atlantic maritime routes and could not develop without the support of a legal regime that would validate, and provide certainty about, transport documents in electronic form. For example, it was stated that there was a need to facilitate delivery of the cargo at the port of discharge without production of a paper bill of lading, which was often necessary for a number of reasons. One reason was that the cargo might reach the port of discharge before the documents necessary for delivery. Another reason was that often the buyer had to receive delivery and sell the cargo in order to be able to pay the price of the cargo and the freight. In addition, it was stated that there was a need to remove the legal uncertainty as to who bore the risk of the cargo not corresponding to its description when discharged. It was pointed out that usually the shipper provided the description of the goods and the bill of lading included a disclaimer that the description was that of the shipper; such disclaimer clauses were not always valid. Moreover, it was stated that there was a need to establish a functional equivalent replicating the uniqueness of the paper bill of lading, which was essential for its function as a title document.

9. Other suggestions were to address all documents of title covering tangible goods (e.g., warehouse receipts), or all documents of title covering tangible and intangible goods, or all negotiable (or even non-negotiable) instruments. In opposition to those suggestions, it was pointed out that covering such a broad range of documents would complicate work since the functions of the respective documents were different, which would make the elaboration of specific rules necessary.

10. After discussion, it was agreed that future work could focus on EDI transport documents, with particular emphasis on maritime electronic bills of lading and the possibility of their use in the context of the existing national and international legislation dealing with maritime transport. After having established a set of rules for the maritime bills of lading, the Working Group could examine the question whether issues arising in multimodal transport could be addressed by the same set of rules or whether specific rules would need to be elaborated.

11. The Working Group then turned to a discussion of possible issues that could be addressed in the context of future work on maritime bills of lading. A number of issues were mentioned. One issue was to ensure the uniqueness of an electronic bill of lading that would allow its "holder" to dispose of the cargo in transit by electronic means while protecting the carrier from the risk of misdelivery. A number of possible ways to address that issue were suggested, including private keys to be used in communications from party to party, electronic certificates, smartcards and registries. With regard to

registries, it was pointed out that a legal regime would need to be devised addressing issues such as subject of registration, parties that could register, parties that would have access to the registry and towards whom the registration could produce effects, confidentiality, accuracy and completeness of the information registered, liability for errors and effects on third parties.

12. Another issue was the definition of the holder in an EDI environment. It was pointed out that in a paper context the holder was defined on the basis of physical possession of the paper bill of lading and was protected against good faith acquisition of rights in the goods by third parties in that possession of the bill of lading functioned as notice to third parties. In an EDI environment, where possession was not possible, the holder might be protected by other means (e.g., registration, use of public and private key sets) or might not be protected at all. Another issue involved the rights and obligations of the holder and the issuer of EDI transport documents (e.g., right of the holder to give instructions in transit and obligation of the issuer to receive and execute those instructions). It was pointed out that, in a paper-based environment, the rights of a holder were based on three principles: (1) the bill of lading was conclusive evidence of title in the goods only after endorsement (conclusive evidence rule); (2) the endorsee was the only party entitled to claim delivery of the cargo at the discharge point; and (3) only the endorsee was entitled to instruct the carrier to vary the contract and make another endorsement. In this respect, it was stated that negotiability needed to be studied in the context of trade law, security law and transportation law. It was explained that property would not be of use if acquired under trade law but effectively lost under transportation law because no right of stoppage or control could be exercised.

13. In addition, it was pointed out that the holder could have a right to possess the goods, a property right in the goods, or a right to receive delivery of the goods arising from a sales contract. It was explained that from the point of view of the carrier the most important question was who had possessory title in the goods, in other terms, to whom should the carrier deliver the goods. Yet another issue was the allocation of liability among the shipper, carrier, consignee and, possibly, a registry.

14. Other issues suggested for study were: the effects of transfer of EDI transport documents on third parties (e.g., when transfer is effective towards the carrier, third parties in the chain of endorsees, third parties not shown in the EDI bill of lading); the rights of the rightful holder in case of a wrongful transfer of the goods and the rights of the transferee in case its title proved to be defective (subject to other parties' rights); timeliness of transfer in an EDI environment; relative priority among multiple claimants of the same cargo; timeliness of messages (e.g., some messages related to pre-contractual terms might create rights and obligations); incorporation by reference; issues of security (principles of identification, authentication, integrity, non-repudiation) designed to promote negotiability in an open EDI environment. It was stated that the issues of security should be considered with respect to a broad range of issues regarding negotiability. In connection with its discussion of security issues, in particular the use of cryptography, the Working Group agreed that possible future work by UNCITRAL should not affect mandatory rules of national legislation adopted for public policy reasons in certain States to restrict the use of cryptography or the export of cryptography-related techniques.

15. After discussion, the Working Group requested the Secretariat to prepare a background study on negotiability and transferability of EDI transport documents, with particular emphasis on EDI maritime transport documents, taking into account the views expressed and the suggestions made with regard to the scope of future work and the issues that could be addressed. A number of other topics were suggested for inclusion in the study, including a report on the potential problems for the use of EDI in maritime transport under existing international instruments and a report on the work undertaken by other organizations in related areas of work. In that connection, the view was expressed that work undertaken within CMI, or the BOLERO project, were aimed at facilitating the use of EDI transport

documents but did not, in general, deal with the legal effects of EDI transport documents. It was stated that particular attention should be given in the study to the ways in which future work by UNCITRAL could bring legal support to the new methods being developed in the field of electronic transfer of rights (A/CN.9/407, paras. 106 to 118).

16. At its twenty-eighth session, in 1995, the Commission adopted the text of articles 1 and 3 to 11 of the draft Model Law. At the close of the discussion on draft article 11, the Commission noted that it had not completed its consideration of the draft Model Law and decided to place the draft Model Law, together with the draft Guide to Enactment of the Model Law, on the agenda of its twenty-ninth session to be held in New York from 28 May to 14 June 1996. It was agreed that the discussion should be resumed at the twenty-ninth session of the Commission with a view to finalizing the text of the Model Law and adopting the Guide to Enactment at that session.

17. With respect to future work in the area of electronic data interchange, the Commission noted that, at its twenty-seventh session, in 1994, general support had been expressed in favour of a recommendation made by the Working Group at its twenty-seventh session that preliminary work should be undertaken on the issue of negotiability and transferability of rights in goods in a computer-based environment as soon as the preparation of the Model Law had been completed. It was also noted that, on that basis, a preliminary debate with respect to future work to be undertaken in the field of electronic data interchange had been held in the context of the twenty-ninth session of the Working Group (for the report on that debate, see A/CN.9/407, paras. 106 to 118).

18. After discussion, the Commission endorsed the recommendation made by the Working Group that the Secretariat should be entrusted with the preparation of a background study on negotiability and transferability of EDI transport documents, with particular emphasis on EDI maritime transport documents (see above, para. 15). The Commission expressed the wish that the requested background study, for the preparation of which the cooperation of other interested organizations such as the Comité Maritime International (CMI) might be sought, would provide the basis on which to make an informed decision as to the feasibility and desirability of undertaking work in the area.

19. The Working Group on Electronic Data Interchange, which was composed of all the States members of the Commission, held its thirtieth session at Vienna from 26 February to 8 March 1996. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Bulgaria, Chile, China, Ecuador, France, Germany, Hungary, Iran (Islamic Republic of), Italy, Japan, Mexico, Poland, Russian Federation, Saudi Arabia, Singapore, Slovakia, Spain, Sudan, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.

20. The session was attended by observers from the following States: Azerbaijan, Belarus, Canada, Czech Republic, Guatemala, Indonesia, Jordan, Kazakstan, Lebanon, Morocco, Netherlands, Oman, Pakistan, Portugal, Republic of Korea, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic and Turkey.

21. The session was attended by observers from the following international organizations: United Nations Conference on Trade and Development (UNCTAD), World Intellectual Property Organization (WIPO), Cairo Regional Centre for International Commercial Arbitration, Comité Maritime International (CMI), International Association of Ports and Harbors (IAPH), International Chamber of Commerce (ICC) and Society for Worldwide Interbank Financial Telecommunication (S.W.I.F.T.).

22. The Working Group elected the following officers:

Chairman: Mr. José-María Abascal Zamora (Mexico);

Rapporteur: Mr. Eu Jin Chua (Singapore).

23. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.IV/WP.68), and a note by the Secretariat (A/CN.9/WG.IV/WP.69).

24. The Working Group adopted the following agenda:

1. Election of officers

2. Adoption of the agenda

3. Planning of future work on the legal aspects of Electronic Data Interchange (EDI): discussion on negotiability and transferability of rights in goods (maritime bills of lading)

4. Preliminary discussion of other possible topics for future work: issues of registration, incorporation by reference, code of conduct for service providers

5. Other business

6. Adoption of the report

I. DELIBERATIONS AND DECISIONS

25. The Working Group discussed the issues of negotiability and transferability of rights in goods in the context of transport documents, with particular emphasis on maritime bills of lading, on the basis of the note prepared by the Secretariat (A/CN.9/WG.IV/WP.69). The deliberations and conclusions of the Working Group with respect to those issues are reflected in section II below. The Working Group also discussed the text of draft provisions prepared on those issues, pursuant to the mandate received from the Commission, at a meeting of a joint CMI-UNCITRAL ad hoc group of experts convened by the Secretariat. After discussion, the text of those draft provisions, with some modifications, was adopted by the Working Group. It was noted that the revised draft provisions would be placed before the Commission at its twenty-ninth session, to be held in New York from 28 May to 14 June 1996, for final review and possible insertion in the draft UNCITRAL Model Law on Legal Issues of Electronic Data Interchange (EDI) and Related Means of Communication. The deliberations and conclusions of the Working Group on the draft provisions are set forth in section III below. The text of the draft provisions is annexed to the present report. The Working Group also discussed possible topics to be considered for future work in the areas of EDI and transport law. The preliminary deliberations and tentative conclusions of the Working Group with respect to those topics are set forth in section IV below.

II. CONSIDERATION OF LEGAL ISSUES OF MARITIME TRANSPORT DOCUMENTS IN AN ELECTRONIC ENVIRONMENT

26. At the outset, the Working Group agreed that, pursuant to the mandate received from the Commission and with a view to providing the basis on which the Commission could make an informed decision as to the feasibility of preparing legal rules in the area of transfer of rights by electronic

means, it would proceed with a general exchange of information regarding the law and practice of transport documents, with particular emphasis on maritime negotiable and non-negotiable transport documents.

A. Negotiable and non-negotiable transport documents

1. General remarks

27. Views were exchanged regarding the use of negotiable and non-negotiable maritime transport documents. There was agreement in the Working Group that there existed a worldwide trend for the promotion of non-negotiable sea way-bills. As to the frequency of use of such non-negotiable documents in practice, the attention of the Working Group was brought to the results of a recent survey conducted by the International Chamber of Shipping (ICS). It was stated that the survey had showed that negotiable bills of lading had virtually passed out of use in certain trades, for example on the Short Sea Liner routes in North Western Europe. On the North Atlantic routes, between North America and Western Europe, non-negotiable documents were also used for a very significant majority of shipments. It was pointed out that these were high-volume trades where transit times were short and where the consequent requirements for fast modern documentary procedures encouraged the use of non-negotiable documents.

28. It was also stated, however, that negotiable bills of lading continued to predominate in many other routes or trades. While such a situation might be due in part simply to lack of awareness among shippers, banks, shipowners and agents, of the benefits of sea way-bills, the following factors were identified by ICS as contributing to the continued use of negotiable bills of lading: banks' instructions to exporters to demand a full set of negotiable bills of lading for transactions where payment was effected by documentary credit; customs import regulations in some countries, which prescribed negotiable bills of lading; higher rates of revenue stamp duty imposed by some countries on way-bills than on negotiable bills of lading; requirements by some countries for original bills of lading to be presented to a consul for legalization; lack of recognition until recently of sea way-bills in the Uniform Customs and Practice for Documentary Credits (UCP) and INCOTERMS published by the International Chamber of Commerce (ICC); the fact that the CMI Uniform Rules for Sea Waybills lacked the international convention status of the Convention for the Unification of Certain Rules Relating to International Carriage by Air (hereinafter referred to as the Warsaw Convention) regarding air way-bills; non-acceptance, sometimes, by cargo underwriters of way-bills as supporting documents for claims in respect of carrier's identity and evidence of contract of carriage; and discouragement by shipping lines, seeking to ensure the payment of freight before releasing the goods, of the use of non-negotiable documents.

2. Legal regime

29. The Working Group engaged in a general discussion about the distinction generally made between negotiable and non-negotiable transport documents in legal theory and about the ways in which that distinction was reflected in transport practice and could be expected to affect the use of electronic communications in that area. It was agreed that the functions performed by transport documents needed to be analyzed with respect to both the contractual relationship between the shipper and the carrier, and the contractual relationship between the shipper and the consignee. A further contractual relationship that required consideration was the relationship between the consignee or the shipper and the credit institutions that might become involved in the financing of the underlying transaction between the shipper and the consignee.

30. Within the legal relationship between the shipper and the carrier, i.e., in the context of the

contract of carriage, a document of transport or its functional equivalent was needed first as receipt for the goods by the carrier and as evidence of the contract of carriage. In addition, the document of transport was needed to embody what was generally referred to as the "right of control of the goods", i.e., the right to give instructions with respect to the goods in transit. It was noted that the term "right of control" was used as a label indicating the right to give all sorts of new instructions to the carrier as to the fulfilment of the contract of carriage. For example, the right of control covered the following instructions: to stop the goods in transit; to unload, to warehouse or to re-route the goods; to bring back the goods to the port of embarkation; and to deliver the goods to some other person than the first consignee indicated in the transport document at any stage of the transit, as well as to change the place of delivery of the goods. Within the contractual relationship between the shipper and the consignee, for example in the context of a contract of sale, the document of transport or its functional equivalent might be used to embody the "title" to the goods, i.e., to command the right to claim delivery of the goods and the fulfilment of the seller's obligation under the contract of sale.

31. The function of the document of transport as receipt for the goods by the carrier and as evidence of the contract of carriage was common to all negotiable and non-negotiable transport documents. As regards the right of control of the goods, it was generally felt that no doubt existed as to whether a transport document embodied the right of control initially vested in the shipper, irrespective of whether the transport document was labelled "negotiable" or not. As to the ways in which the initial right of control of the goods could be transferred by the shipper, for example to the consignee in the case where payment for the goods had been received before shipment or during transit, it was observed that the right of control could be transferred under a non-negotiable transport document, although such a transfer could be more easily performed under a negotiable bill of lading. It was stated that the right of control initially vested in the shipper could be transferred either through negotiation of a bill of lading, by operation of a specific clause in the sea way-bill or, after issuance of the sea way-bill, through an additional clause, often stamped on a non-negotiable sea way-bill to indicate that the shipper ceased to have control of the goods. In the absence of a specific clause, the insertion of which necessarily required the agreement of the carrier, a sea way-bill would establish the right of control vested in the shipper but it could not be used to transfer that right. It was stated that under legal regimes applicable to non-maritime modes of transport, the right of control was connected to a certain copy of the transport document. Transfer of the right of control would be operated by the transmission of a specified copy of, for example, a consignment note under the Convention on the Contract for the International Carriage of Goods by Road (CMR), or an air way-bill under the Warsaw Convention.

32. The function of the transport document as embodying title to the goods was specific to negotiable bills of lading. It was pointed out that transactions involving bills of lading normally linked the transfer of the right of control with the transfer of property or other possessory rights in the goods. Bills of lading were, for that reason, often described as "the link" between the contract of sale and the contract of carriage. In that respect, it was widely felt that any attempt to devise a functional equivalent to the bill of lading as a document of title should recognize the need to synchronize the transfer of the right of control under the contract of carriage and the transfer of the possessory rights under the contract of sale.

33. It was stated that the specific function of the negotiable bill of lading as a document of title, although recognized throughout the world, was of uncertain legal origin in many countries, and that it seemed to be rooted in established practice more than in any rule of law. Examples were provided, illustrating the fact that the legal regime of negotiable bills of lading was essentially a combination of various maritime usages and practices that had developed over a long period of time. While those various usages and practices were reflected in statutory law in certain countries and in case law in most countries, the area of maritime transport documents was characterized by a lack of uniformity in the applicable legal regimes, and practice suffered from such a lack of uniformity. As an example of the

difficulties encountered in practice, it was stated that conflicts might arise as to which party had the right to stop the goods during transit. The carrier might be faced with conflicting court orders from two different countries, based on differing interpretations as to which party held the right of control and the title to the goods. It was noted that there existed no international convention dealing with the rights and obligations of the various parties involved and it was generally agreed that the possibility and feasibility of undertaking the preparation of a uniform legal regime for bills of lading, with possible extensions to cover other transport documents, might need to be further discussed by the Commission (see below, paras. 104-108). It was generally agreed, however, that possible uncertainties and disparities as to the legal origin of the bill of lading as a document of title should not deter the Working Group from attempting to devise a functional equivalent of that document, for use in an electronic environment. Adopting the functional-equivalent approach would be neutral with respect to the need to solve substantive law problems that might have existed for many years in the context of traditional paper-based practice. However, it would have the advantage of providing guidance as to how current practice should evolve so as not to be made even less satisfactory by the introduction of electronic communications.

34. As to the way in which the distinction between negotiable and non-negotiable transport documents operated in current practice, it was stated that the distinction between the two kinds of instruments was not always clear and that one of the effects of the introduction of EDI might be to blur the distinction further. Examples were given regarding the obligations that prevailed in various countries with respect to delivery of the goods. It was stated that, under the law of certain countries, a transport document would in any event be regarded as negotiable, irrespective of whether it was regarded as non-negotiable in the country where it had been initially issued. As to banking practice, it was stated that, in many countries, banks would require a negotiable document of title in order to ensure that they had a tangible security in the goods. However, the view was expressed that, under banking practice, it was not uncommon to accept sea way-bills or other non-negotiable transport documents such as air way-bills for the purposes of documentary credit, a practice also recognized under UCP 500. However, it was stated that the legal basis for such banking practice might be found not in the transfer of any right under the transport document but in other contractual relationships between the bank and its customer, for example, in the main account relationship, in an individual agreement granting credit facility, in a specific assignment of its rights by the applicant for the documentary credit, or in any other transaction through which the bank might become pledgee of the goods. It was pointed out that, in most circumstances, acceptance of non-negotiable documents by banks in the context of documentary credit would be determined by the bank's assessment of the credit-worthiness of the applicant and by the availability of legal mechanisms external to the transport document, through which the bank would obtain the same level of legal safety as would have resulted from the transfer of a full set of original bills of lading.

35. As to the impact to be expected from the use of electronic communications on the above-described practices, it was stated that the use of data messages would further reduce the practical distinction between negotiable and non-negotiable transport documents, at least with respect to transfer of the right of control of the goods. With the exchange of a number of EDI messages between the interested parties being envisaged, for example under the CMI Rules for Electronic Bills of Lading (hereinafter referred to as the "CMI Rules"), to replace the issuance and transfer of a paper transport document, it was stated that the same messages would be exchanged between the shipper, the carrier, the consignee and the bank, irrespective of whether they would have relied on a negotiable or a non-negotiable document in a paper-based environment.

36. However, it was generally felt that such practical changes to be expected from the introduction of EDI would carry no immediate effect as to the legal distinction between negotiable and non-negotiable transport documents, which prevailed in many countries and entailed a number of mandatory requirements as to the labelling of such documents. In that respect, the attention of the Working

Group was brought to the fact that certain EDIFACT messages made it possible to use a number of codes to indicate what rights were transferred with the information contained in the message. It was widely felt that, to the extent possible, the distinction between negotiable and non-negotiable rights would need to be carried over to any functional equivalent to transport documents (for continuation of the discussion, see below, paras. 89-91).

3. Multiple originals

37. A question was raised as to how the use of electronic communications could be combined with the current practice to issue more than one original bill of lading. It was pointed out that, in certain countries, such a practice resulted from statutory requirements to issue more than one original, for example with a view to producing an original version of the bill of lading to customs authorities. In response, it was stated that the use of electronic communications would almost necessarily prevent the issuance of multiple originals, since electronic systems would be equipped with security devices intended to prevent such a duplication of messages. It was pointed out that the functional equivalent of a bill of lading would thus be equivalent to a full set of bills of lading. Under current practice, the right of control of the goods could only be exercised by the holder of a full set of bills of lading, but delivery of the goods could be claimed by presentation of only one original bill of lading. While the Working Group widely shared the view that the change to be foreseen with the introduction of EDI should be regarded as an improvement of current practice and a welcome opportunity for a number of States to update their legislation, a question was raised as to whether it was appropriate for the Model Law to encourage the establishment of a new EDI practice, which would not merely imitate paper practice but, in that respect, change it substantially.

38. In response, it was pointed out that, with the development of EDI, the perceived need to protect the issuer against the risk of loss of the original document would no longer exist. In addition, it was stated that the provisions of the draft Model Law and the suggested additional provision contained in draft article "x" did not affect the statutory provisions that might prescribe the issuance of more than one original in certain States. Moreover, it was stated that the effect of legal rules such as the CMI Rules was not to prohibit the issuance of multiple original bills of lading. While the issuance of multiple originals had not been envisaged, it was not inconceivable under those Rules, although the issuance of several originals would require the issuance of several private keys for the same bill of lading.

4. Combination of paper documents and dematerialized equivalents

39. Questions were raised as to the possible interplay of EDI and transactions effected by transfer of paper documents. It was generally felt that the Model Law might need to address situations in which paper-based and EDI communication techniques would be used concurrently in the context of a given transaction. It was suggested that, in the case where a paper bill of lading was converted into a series of data messages after it had been issued in the form of a paper document, specific provisions were needed to avoid that the original paper document could be used at a later point in the transaction, either in good faith or fraudulently. In response to that suggestion, it was stated that, under the current paper-based practice, changes might also occur during carriage that might require the issuance of a new bill of lading, for example where a shipment originally addressed to a single consignee was subsequently split between several consignees. In such a situation, the original bill of lading would be cancelled and new bills of lading would be issued. The prevailing view, however, was that the issue might be more complex if various modes of communications were used and that specific provisions might be needed. As to how best that issue should be addressed, one suggestion was to incorporate provisions in the text of the draft Model Law. Another suggestion was to draw the attention of legislators considering possible enactment of the Model Law to the issue by way of a mention in the Guide to Enactment. It was agreed that further consideration should be given to the need to establish

rules to avoid discriminating against parties that would continue to rely on paper documentation, and also to solve the potential conflict between rights that might be evidenced, at any point in time, simultaneously in electronic form and in the form of paper documents, and that might be transferred in those different forms. A suggestion was made that a rule should be established to the effect that, at any given point in time, a paper title and its equivalent in electronic form could not circulate simultaneously (for continuation of the discussion, see below, paras. 76 and 92-103).

B. Registries

40. The Working Group noted that, in devising a functional approach in establishing rules for an electronic bill of lading (see A/CN.9/WG.IV/WP.69, paras. 49-52), there were in particular two functions inherent in a paper bill of lading that posed particular difficulties; those functions were the ability of the holder of the bill of lading to transfer the right of the shipper to control the goods and the ability to transfer the title in the goods. Those two functions required reliable assurance that the right or the title had been transferred to the intended, and no other than intended, person (the "singularity" or "uniqueness" feature of the message). It was thought that, in order to create an electronic equivalent to those two functions that possessed the required singularity, it was necessary to establish a form of "registry" of the information about the transfer, although other means were possible.

41. The discussion covered various ways in which such a registry might be established. One method was the one envisaged in the CMI Rules. Under the CMI Rules, it was the carrier who had the registry function in the sense that the carrier gave a unique secret code ("private key") to the shipper and that the shipper, by possessing that private key, was the only person holding the control of, and the title to, the goods, until, by using that private key, the shipper instructed the carrier to cancel the issued private key and issue a new and unique private key to a new holder of those rights. The party who possessed the private key was thus considered to be the holder of the right of control over the goods and the holder of the title to the goods. Through keeping the information about the private key and by issuing any successive and new private keys, the carrier acted as a registry of unique information about the rights in the goods.

42. Another method for establishing a registry was the one used under the "BOLERO project" (see A/CN.9/WG.IV/WP.69, paras. 79-81). The BOLERO system was similar to the system of the CMI Rules, except that the person who registered and held the information about the person having the rights in the goods was not the carrier but an entity other than the carrier. The involvement of such an entity gave rise to questions such as: on whose behalf the registry was acting; the liability for loss that could be attributed to a failure of the computer program; and the liability for negligence of the registry.

43. It was noted that, while both methods were devised specifically to deal with EDI messages replacing the transfer of bills of lading, the method of the CMI Rules had not been tested in practice and the BOLERO method had not gone beyond being tested as a pilot project involving a small number of selected traders and carriers.

44. Various observations were made with respect to the two methods. Under the CMI Rules, unless special measures were taken, the carrier would have the knowledge about the identity of each successive owner of the goods; that knowledge, it was observed, the carrier did not necessarily have and often did not have in the case of a paper bill of lading. It was said that that knowledge made it easier for the carrier to suspect and detect that the person who presented itself as the holder of the private key was not the rightful owner of the goods. Under the BOLERO project, under which the information about the successive owners of the goods were kept by a person other than the carrier, the

question arose as to whether the carrier should have access to the information about the identity of the successive owners of the goods. That question, with respect to which opinions differed, and which would influence the acceptability of the BOLERO project to the users, remained to be answered.

45. The question of the access to information about the sellers and buyers of goods in transit gave rise to a consideration of the broader issue of confidentiality of transport-related information stored in electronic form. The matters that were mentioned in that connection were, in particular: the use of encryption techniques; the access of law-enforcement officers to information; whether under the CMI Rules the goods could be consigned not to a named person but to the bearer of the private key; the possibility for an endorsee of a bill of lading to conceal from the next endorsee or endorsees the identity of the shipper, which might be done by obtaining from the carrier a new bill of lading on which the endorsee appeared as the shipper. It was generally felt that the issues of confidentiality were influenced by different areas of law such as transport law, criminal law as well as trade usages and that, therefore, it was beyond the scope of the draft Model Law to attempt to provide solutions. Furthermore, whatever systems of registry were to be used, the level of confidentiality and the measures to ensure it would have to be acceptable to the users. In that connection, it was remarked that the question of confidentiality in a registry such as the one under BOLERO, in which information of a great number of transactions were to be kept, was potentially more sensitive than a registry under the CMI Rules, where the information held by the carrier only concerned goods in charge of that carrier.

46. Next, it was observed that, under a paper bill of lading, the carrier was responsible for any misdelivery of goods, i.e., delivery to the person who was not the holder of the bill of lading. That responsibility was said to be essentially the same under the CMI Rules in that the carrier was responsible to ascertain who was the person entitled to take delivery of the goods (by virtue of being the holder of the private key) and was responsible for delivering the goods to the right person. Because of this parallelism of responsibility there was no need to elaborate special provisions on liability of the carrier for misdelivery under the CMI Rules.

47. Under the BOLERO project, however, the carrier might not be at fault for misdelivery of goods if the reason for the misdelivery was a mistake committed by the person maintaining the registry or a failure of the computer program. Thus, from the viewpoint of cargo owners, BOLERO gave rise to questions such as the distribution of risk for misdelivery between the cargo owner, the carrier and the registry, and the standard of liability in case misdelivery was a consequence of a mistake. An answer to that question was said to be crucial for a successful launching of the project.

48. Yet another type of registry that was mentioned was one used in some States for recording in electronic form transactions in stocks and bonds. Such registries typically functioned under authorization by the State and had the exclusive right and duty to evidence those transactions. A significant difference between such a registry and the registry under the CMI Rules or BOLERO was that the access to the registry for transactions in stocks and bonds was usually restricted to stockbrokers, while the other registries were meant to be accessed by a broader range of commercial persons such as buyers and sellers of goods, freight forwarders or banks.

C. Digital signatures

49. The Working Group heard a presentation on "digital signatures", i.e., mathematical codes used in electronic communications in order to ensure: that a particular data message originated from a particular person (authentication function); that the data message had not been altered since its creation and transfer (verification of integrity function); and that the recipient could not alter the message received (non-repudiation function).

50. At the outset, it was stated that digital-signature technology was only one of the methods currently used in practice in order to ensure the security of electronic communications and was not necessarily suitable to all types of electronic communications. On the other hand, it was observed, other methods, such as the one relying on the use of hardware-based cryptographic tokens, known in practice as "smartcards", were not yet fully developed.

51. It was explained that, through the use of particular hardware and software, traders could create a pair of mathematical codes, namely a "private key", which was known only to its author, and a "public key", which was known to the public. In addition, it was stated that the digital signature was the result of a combination of a mathematical code created by the originator to secure the uniqueness of a particular message and of the private and public keys of the originator. The recipient of that data message, using particular software separating the message from the digital signature, could verify both the integrity of the data message and the identity of its author.

52. In response to a question that was raised, it was explained that one of the problems arising in the context of the use of digital signatures was the uncertainty existing with regard to public keys of traders. In order to address that problem, the practice developed the use of trusted third parties, known as certification authorities, public or private, the function of which was to issue certificates identifying a trader and assigning it a public key for use in electronic communications. It was observed that the number of certification authorities was growing rapidly. However, in view of the fact that their operation was based on new technology, the efficiency of which would need to be proven by a longer period of use, there still existed some uncertainty as to whether certification authorities would be able to fully address the need for security in electronic communications.

III. CONSIDERATION OF DRAFT MODEL STATUTORY PROVISIONS ON MARITIME TRANSPORT DOCUMENTS IN AN ELECTRONIC ENVIRONMENT

53. The Working Group based its deliberations on the text of a draft article, which had been placed before it in the note prepared by the secretariat for the current session, as a result of a meeting of a CMI-UNCITRAL ad hoc group of experts (A/CN.9/WG.IV/WP.69, para. 95). The text of the draft article read as follows:

"Draft Article 'x'. Contracts of Carriage involving data messages

"(1) This Article applies to any of the following actions in connection with or in pursuance of a contract of carriage:

"(a) (i) furnishing the marks, number, quantity or weight of goods;
(ii) stating or declaring the nature or value of goods;
(iii) issuing a receipt for goods;
(iv) confirming that the goods have been loaded;

"(b) (i) notifying a person of terms and conditions of the contract;
(ii) giving instructions to a carrier;

"(c) (i) claiming delivery of goods;
(ii) authorizing release of goods;
(iii) giving notice of loss of, or damage to, goods;

"(d) giving any other notice in connection with the performance of the contract;

"(e) undertaking, irrevocably or not, to deliver goods to a named person or a person authorized to claim delivery;

"(f) granting, acquiring, renouncing, surrendering, transferring or negotiating rights in goods;

"(g) acquiring or transferring rights [, including rights of suit,] and obligations under the contract.

"(2) Where a rule of law requires that, when any action in paragraph (1) is carried out, information be in writing or be presented in writing or in a paper document, in order that a person may acquire or fulfil an obligation or acquire or exercise a right in connection with or in pursuance of a contract of carriage, or provides for certain consequences if the information is not in writing, that rule shall be satisfied if the information is contained in one or more data message.

"(3) If it is intended, through any of the actions in paragraph (1), that a right or obligation is to become exclusively that of one person and if a rule of law requires that, in order to give effect to that intention, information concerning the right or obligation must be communicated to that person in writing or in a paper document, that rule is satisfied if the communication of the information includes the use of one or more data messages, provided a method is also used to give reliable assurance that the right or the obligation has become that of the intended person and of no other person.

"(4) Where any question is raised as to whether paragraph (3) of this article is satisfied, the standard of reliability required shall be assessed in the light of the purpose for which the communication was made and in the light of all the circumstances, including any agreement between the parties.

"[(5) Where a rule of law requires information in connection with a contract of carriage to be stored, communicated, received or otherwise processed, that rule may be satisfied by operation of a registry or of a database [by one of the parties to the contract of carriage or by a third party].]

"(6) The provisions of this Article do not apply to the following: [...]".

A. General remarks

54. Before entering into an analysis of the individual provisions of draft article "x", the Working Group held a general discussion concerning the relationship between draft article "x" and the main body of the draft Model Law. The Working Group also discussed a number of general issues raised by the matters dealt with in draft article "x", and the manner in which they were dealt with therein.

1. Scope of draft article "x"

55. It was noted, at the outset, that draft article "x" focused on negotiability of rights arising from the contract of carriage of goods, and thus contained provisions of a rather specific nature. The view was expressed that such industry-specific provisions were not consistent with the other provisions contained in the draft Model Law, which were of a general nature and did not establish rules specifically geared to any particular type of trade or commercial transaction. With a view to ensuring consistency with the general approach taken under the draft Model Law, it was suggested that the work

should focus on the preparation of provisions dealing with negotiability of rights in goods in general, to be placed in chapter II of the draft Model Law, together with other provisions dealing with the general application of legal requirements to data messages. Furthermore, it was stated that combining in the same model law a set of general provisions along the lines of chapters I to III of the draft Model Law, and specific provisions dealing with transport documents, might raise questions as to the reasons why specific rules were needed only in the area of transport and not in the other areas listed in the definition of the term "commercial" in the footnote to article 1. It was suggested that explanations in that respect would need to be included in the Guide to Enactment of the Model Law.

56. In response, it was recalled that the Commission, at its twenty-eighth session, had endorsed the recommendation of the Working Group that the study to be prepared by the Secretariat should focus on EDI maritime transport documents (A/50/17, para. 309). The prevailing view was that the recommendation made by the Working Group at its twenty-ninth session was particularly appropriate in view of the need for industry-specific provisions in the area of transport of goods by sea. It was pointed out that the carriage of goods was the context in which electronic communications were most likely to be used and in which a legal framework facilitating the use of those communications was most urgently needed. It was also recalled that, throughout the preparation of the draft Model Law, while the Working Group had focused on the general provisions that were necessary to facilitate the use of EDI, it had never excluded the possibility of preparing also industry-specific provisions if the need for such provisions was recognized. It was further recalled that, at the twenty-seventh session of the Commission, while the Working Group had been requested to prepare a draft set of basic "core" provisions regarding the use of EDI for consideration at the twenty-eighth session of the Commission, it had been pointed out that further provisions could be added at a later stage, particularly since EDI was an area of rapid technological development (A/49/17, para. 200).

57. As to the scope of draft article "x", it was stated that, while the work should be focused on transferable maritime bills of lading, solutions should also be sought for the transposition of other transport documents, particularly non-negotiable transport documents, in an electronic environment (see A/CN.9/WG.IV/WP.69, para. 83). It was noted that draft article "x" contained provisions that applied equally to non-negotiable transport documents and to transfer of rights in goods by way of transferable bills of lading. It was generally felt that it should be made clear that the principles embodied in draft article "x" were applicable not only to maritime transport but also to transport of goods by other means, such as road, railroad and multimodal transport. It was noted that the preparation of rules applicable to transport documents and not merely to transferable bills of lading was consistent with the mandate received from the Commission (A/50/17, para. 309).

58. After deliberation, the Working Group decided to proceed with the preparation of provisions regarding transport documents, along the lines of draft article "x", the substance of which was found to be generally acceptable. It was agreed that, should the discussion reveal that some of the rules developed for transport documents provided useful guidance as to how the general issues of transfer of rights through electronic communications should be dealt with, further discussion might be needed as to how to incorporate such principles in a more generally applicable provision.

2. Relationship of draft article "x" with other provisions of the draft Model Law

59. As to the possible location of draft article "x" in the Model Law, various suggestions were made as to how best to make it clear in the structure of the text that the Model Law combined rules that were aimed to be of general application, with provisions specifically designed for transport documents and, possibly, with other industry-specific provisions that might be added at a later stage. A proposal was made to place draft article "x" in a separate chapter of the Model Law. That suggestion was objected to on the grounds that it might insufficiently differentiate the general rules contained in chapters I to III and the specific provisions of article "x". Another suggestion was made

to place draft article "x" in an annex to the Model Law. It was stated that the advantage of placing the provisions of draft article "x" in an annex was that it might make it easier to add other industry-specific provisions, possibly to be developed at a later stage. However, a concern was expressed that placing draft article "x" in an annex could have the unintended result of raising doubt as to the legal value of that article, as to its relevance to the rest of the Model Law, and as to the level of approval with which it was met in the Working Group and the Commission.

60. After discussion, the Working Group agreed that the draft article should appear in the Model Law in a way that reflected both the specific nature of the provisions regarding transport documents and their legal status, which should be the same as that of the general provisions contained in chapters I to III of the draft Model Law. It was agreed that placing the two kinds of provisions on an equal footing was necessary in view of the fact that the specific rules would need to be applied cumulatively with the general rules. Of particular relevance in that respect were the requirements contained in chapter II as to the conditions to be met by functional equivalents of "writing", "signature" and "original", which would also be applicable to functional equivalents of bills of lading. The Working Group decided to suggest to the Commission that chapters I to III of the draft Model Law should be embodied as Part I of the Model Law, while draft article "x" should form Part II. It was stated that adopting such a structure would make it easier to add further industry-specific provisions to the Model Law, as the need might arise. In addition, it was agreed that the interplay of draft article "x" and the other provisions of the draft Model Law might need to be explained in the text of the decision to be made by the Commission when adopting the Model Law, and in its recommendation to the General Assembly.

3. Possible extension of the principles embodied in draft article "x"

61. A suggestion was made that it should be possible to derive general rules from draft article "x" (in particular its paragraphs (3) and (4)) with respect to the transfer of rights through the use of functional equivalents of documents of title in an electronic environment.

62. While it was generally agreed that general rules in that respect might be desirable, doubts were expressed as to whether it would be feasible to create functional equivalents for all documents of title merely by extending the principles contained in draft article "x". For example, it was generally felt that work with respect to such documents of title as bills of exchange and stock exchange certificates might reveal complex problems that could not be solved by simple provisions along the lines of draft article "x". While those issues might be suitable for future work, to be undertaken in consultation with the banking industry, it was generally felt that the Working Group could not embark in the preparation of such general rules at the current session.

4. Substance of draft article "x"

63. A suggestion was made to add provisions regarding the time as of which possessory rights in goods would be transferred under functional equivalents to bills of lading. It was stated that it might be necessary to establish the point in time when transmission of data messages would carry the legal effect obtained from the physical transmission of a paper bill of lading. That suggestion did not attract sufficient support. It was stated that any attempt to determine the time of transfer of rights in goods would necessarily go into the substance of the legal regime of paper bills of lading, a topic that might be suitable for future work on substantive law (see below, paras. 104-108) but that needed not be touched upon when establishing the functional equivalent to a paper bill of lading. It was pointed out that uncertainties as to the legal situation between the time when a paper bill of lading was sent and the time when it was received already existed in paper-based practice. In many countries, legal rules existed regarding the time as of which rights embodied, for example, in a paper bill of lading sent by mail, were transferred to a consignee. It was generally felt that the Model Law should not interfere

with such rules. It was noted, in addition, that the draft Model Law already contained an optional rule regarding the time and place of dispatch and receipt of data messages. That rule, currently embodied in draft article 14, was generally regarded as offering a solution for the users that might wish to adopt it, and as constituting sufficient guidance for the States that might consider enacting it.

B. Individual provisions of draft article "x"

1. Paragraph (1)

64. The Working Group found the substance of paragraph (1) to be generally acceptable. A concern was expressed that paragraph (1), which established the scope of draft article "x", might be too broadly drafted. It was stated that paragraph (1) would encompass a wide variety of documents used in the context of the carriage of goods, including, for example, charter-parties. The view was expressed that the inclusion of such documents as charter-parties in the scope of article "x" might be regarded as inappropriate under the legislation of certain countries. In response, it was stated that, by dealing comprehensively with contracts of carriage of goods, paragraph (1) was consistent with the decision of the Working Group to cover all transport documents, whether negotiable or non-negotiable, without excluding any specific document such as charter-parties. It was pointed out that, if an enacting State did not wish draft article "x" to apply to a particular kind of document or contract, it could make use of the exclusion clause contained in paragraph (6).

65. It was generally agreed that paragraph (1) was of an illustrative nature and that, although the actions mentioned therein were more common in maritime trade, they were not exclusive to such type of trade and could be performed in connection with air transport or multimodal carriage of goods. It was suggested that the illustrative nature of paragraph (1) should be more clearly indicated, by the introduction of the words "including, but not limited to" in the opening words of paragraph (1). It was also agreed that all references to a "contract of carriage" in draft article "x" should be restricted to the carriage of goods.

66. With respect to subparagraph (g), the Working Group considered whether the words "including rights of suit" in square brackets should be retained. In support of retaining those words, it was stated that a reference to the rights of suit might be needed to make it clear that the transfer of certain rights was intended to entail transfer of the corresponding rights to engage legal proceedings. The view was also expressed that mentioning the rights of suit might facilitate the recognition of the rights of persons who were not parties to the contract of carriage, e.g., consignees and their agents, to sue for delivery of the goods. However, the prevailing view was that, under the laws of most countries, transfer of the substantive rights entailed ipso facto transfer of the corresponding "rights of suit". The retention of the words between square brackets might thus lead to confusion. Furthermore, the Working Group generally agreed that its mandate did not include such vast matters as agency, representation and privity of contract, and that it would be inappropriate for draft article "x" to interfere with national requirements and international conventions on such matters.

2. Paragraph (2)

67. The view was expressed that paragraph (2), which, in essence, mirrored the provisions of article 5, inappropriately focused on the transmission of information. It was stated that, in the context of transport documents, it was necessary to establish not only functional equivalents of written information about the actions referred to in paragraph (1), but also functional equivalents of the performance of such actions through the use of paper documents. It was explained that functional equivalents were particularly needed for the transfer of rights and obligations by transfer of written documents. In response, it was stated that, while article 5 dealt with information in writing, paragraph

(2) was precisely intended to address the question whether the actions or functions listed in paragraph (1) could be carried out by electronic means. For example, paragraph (2) was intended to replace both the requirement for a written contract of carriage and the requirements for endorsement and transfer of possession of a bill of lading. It was generally felt, however, that the focus of the provision on the action referred to in paragraph (1) should be expressed more clearly, particularly in view of the difficulties that might exist, in certain countries, for recognizing the transmission of a data message as functionally equivalent to the physical transfer of goods, or to the transfer of a document of title representing the goods. After deliberation, the Working Group decided that the references to "information" in paragraph (2) should be replaced by references to the "actions" referred to in paragraph (1). In response to a suggestion that a reference to written information should be maintained in paragraph (2), it was generally felt that functional equivalents of written information were sufficiently covered by the general provisions of article 5 of the draft Model Law.

68. Various views were expressed and suggestions were made with respect to the substance of paragraph (2). One view was that, while article 5 of the draft Model Law dealt with the situation where the law required information to be in writing, it did not satisfactorily deal with the situation in which, although it was not required by law that information be in writing, a rule of law would provide for certain consequences if such information were voluntarily put in writing. Paragraph (2) might thus provide an opportunity to deal with the latter situation. As they were not necessary in the context of paragraph (2), it was suggested that the words "or provides for certain consequences if the information is not in writing" should be deleted. While some support was expressed in favour of that suggestion, it was generally felt that both of the above-described situations were sufficiently covered by article 5 and by paragraph (2).

69. As a matter of drafting, it was generally felt that wording along the lines of "where a rule of law requires information to be in writing, or provides for certain consequences if it is not, a data message satisfies that rule" might lend itself to misinterpretation. In particular, it was felt that such wording did not make it sufficiently clear that a data message would be regarded as equivalent to writing in both situations where a rule of law required information to be in writing, and where a rule of law provided for certain consequences if that information was not in writing. After discussion, the Working Group agreed that the wording in paragraph (2) should continue to mirror the text of article 5. It was strongly felt, however, that the attention of the Commission should be brought to the ambiguity potentially arising from the text of article 5.

70. With respect to the reference to "a rule of law" in paragraph (2) and, more generally, in draft article "x", the view was expressed that the reference to rules of law should be supplemented by a reference to customs and practice. It was pointed out that, in some jurisdictions, the requirements that information should be produced in documentary form did not derive from a "rule of law" but from customs and practices which were so consistently followed that they acquired a de facto authority, even though they might not have been recognized as binding rules by judicial decision. In support of that suggestion, it was observed that parties, such as port authorities, should not be allowed to interfere with the decision of the shipper and the carrier to use data messages in their contract of carriage, by imposing on them arbitrary customs and practices requiring the use of paper documents. That suggestion was objected to on the ground that, if the Model Law were to overrule requirements of custom or practice which were contractual in nature, the Model Law would have the unintended result of forcing parties to use EDI means of communication. It was recalled that, in the context of its discussion of article 5 of the draft Model Law, the Commission had decided that the scope of article 5 should be confined to rules of law (A/50/17, paras. 231-235). After discussion, the Working Group decided that no reference to custom and practice should be included in paragraph (2). A concern was expressed, however, that a narrow understanding of the words "rule of law" might be inconsistent with the broad meaning of the expression "rules of law" in article 28 of the UNCITRAL Model Law on International Commercial Arbitration, as distinct from the narrower expression "law or legal system of

a given State" in that same article. It was noted that the issue might need to be further discussed by the Commission.

71. After discussion, the Working Group was agreed that paragraph (2) should be redrafted to read along the following lines: "Where a rule of law requires that any action referred to in paragraph (1) be carried out in writing or by using a paper document, or provides for certain consequences if it is not, that rule is satisfied if the action is carried out by using one or more data messages".

3. Paragraph (3)

72. It was pointed out that paragraph (3), in combination with paragraph (4), was intended to ensure that a right could only be conveyed to one person, and that it would not be possible for more than one person at any point in time to lay claim to it. That effect of the two paragraphs was to introduce a requirement which was referred to as the "guarantee of singularity". It was stated that, if procedures were made available to enable a right or obligation to be conveyed by electronic methods instead of by using a paper document, it was necessary that the guarantee of singularity be one of the essential features of such procedures. Technical security devices providing such a guarantee of singularity would almost necessarily be built into any communication system offered to the trading communities and would need to demonstrate their reliability. However, there was also a need to overcome requirements of law that the guarantee of singularity be demonstrated, for example in the case where paper documents such as bills of lading were traditionally used. It was generally felt that a provision along the lines of paragraph (3) was necessary to permit the use of electronic communication instead of paper documents.

73. The view was expressed that paragraph (3) did not quite achieve its objective in that it merely referred to communicating information concerning the right or obligation. For the reasons discussed in the context of paragraph (2), it was generally agreed that a reference to the transfer of the rights or obligations conveyed in the paper document was needed (see above, para. 67). For that purpose, it was proposed to replace the words "information concerning the right or obligation must be communicated" with the words "the right or obligation must be conveyed".

74. Various proposals were made to improve the drafting of paragraph (3). For purposes of clarity, it was proposed that the words "a right or obligation is to become" should be replaced by the phrase "a right is to be granted to, or an obligation is to be acquired by,". In order to clearly establish the scope of the guarantee of singularity contained in paragraph (3), it was proposed to replace the word "exclusively that of one person" by the words "that of one person and of no other person". It was further proposed to delete the words "intended" and "intention", as those words were considered to give rise to questions connected with the definition of intention and the identity of the person having that intention. The following wording was thus proposed for paragraph (3):

> "If a right is to be granted to, or an obligation is to be acquired by, one person and no other person, and if a rule of law requires that, in order to effect this, the right or obligation must be conveyed to that person by the transfer of a paper document, that rule is satisfied if the right or obligation is conveyed by any means which includes the use of one or more data message, provided a method is used to give reliable assurance that the right or obligation has become that of the intended person and of no other person."

75. The Working Group based its deliberations on the above-proposed revised version of paragraph (3). An objection was raised with respect to the proposed deletion of the word "exclusively" and its replacement by the words "one person and no other person". It was pointed out that the latter expression might be interpreted as excluding situations where more than one person might jointly be assigned, in whole or in part, the rights in the goods described in a bill of lading. However, it was

realized that, in practice, such situations would not arise, as carriers did not customarily accept to carry goods under a bill of lading which mentioned multiple assignees, so as to avoid the risk of having to deal with conflicting instructions coming from different consignees. It was also pointed out that the word "person" in the above proposal would not necessarily entail that there could not be multiple consignees, if all parties so agreed. It was pointed out that the word "person" was used, for example, in article 15 of the United Nations Convention on International Bills of Exchange and International Promissory Notes, without such limiting connotation. It was felt that, in order to avoid misunderstandings as to the meaning of the above-mentioned phrase, the Guide to Enactment of the Model Law should contain a comment to the effect that the reference to "one person" would not exclude joint ownership of rights in the goods or other rights embodied in a bill of lading.

76. The Working Group discussed the method for giving the reliable assurance required by paragraph (3) that "the right or obligation has become that of the intended person and of no other person". The view was expressed that such a reliable assurance would require preventing the simultaneous use of electronic and paper bills of lading, a situation which was not dealt with by paragraph (3) or any other provision of draft article "x". It was proposed that a specific provision to that effect should be inserted in draft article "x" (see below, paras. 92-103). However, it was stated that, in practice, it would not be cost-effective or meaningful for carriers to conduct transactions both by EDI and by traditional means and that it was unlikely that there would be bills of lading issued in both forms. It was also stated that the parties themselves, and such third parties as banks, would demand the assurance that there was no duplication of a document of title, since no level of confidence would be achieved by any system that permitted the use of both media at the same time. A question was raised as to whether the reliable assurance referred to in paragraph (3) concerned an assurance as to the integrity of the data transmitted through EDI, or whether it concerned an assurance that, in law, the right or obligation was "that of the intended person and of no other person". In response to that question, it was stated that draft article "x" was not concerned with matters of substantive law, but merely with the system used for transmitting the information or conveying the right or obligation, as the case might be. In that respect, the reliable assurance referred to in paragraph (3) concerned the overall security and reliability requirements of the system as such.

77. It was pointed out that rights or obligations could be assigned by other means than the actual transfer of a bill of lading. In order to clarify that the scope of paragraph (3) was not limited to situations requiring the actual transfer of the document itself, it was agreed that the words "or use" should be inserted between the words "by the transfer" and "of a paper document". After discussion, the Working Group adopted the text of the revised paragraph (3).

4. Paragraph (4)

78. It was generally agreed that security was a crucial element for the success of an EDI-based system of international trade. The Working Group considered the functioning of possible security devices and mechanisms, such as the use of time-stamping, cryptography, access keys, and digital signature. In that connection, the view was expressed that technological advancements were unpredictable and that, as the Working Group lacked the technical expertise in the field of security of electronic information, it should focus its attention on the system of registry, which was held to be the only reliable system thus far established. The Working Group generally felt that it would not be advisable to refer, in the context of draft article "x", to any particular security system or mechanism, so as not to tie down the Model Law to technologies that might conceivably become obsolete in the near future. The view was expressed that, however elaborate and craftily formulated, security standards did not provide an absolute guarantee against the possibility of fraud, which also happened in a paper-based environment. In the event the Working Group considered establishing security standards, the Working Group would also have to consider the sanctions that would follow from the non-observance of such standards. In that connection, the view was expressed that the parties involved

(shippers, carriers, banks, buyers) would naturally develop a workable solution, as some particular groups (such as banks) had already done or were in the process of doing. It was added that security was primarily a matter of system reliability and liability for its failures. Furthermore, whoever exercised the registry function would be liable for the negligence of its own personnel or for the failure to protect the system from unauthorized use.

79. The substance of paragraph (4) was found to be generally acceptable. It was generally felt that paragraph (4) adequately addressed the issue of security and that it would be difficult, at this stage, to formulate a more precise standard of security that would address all possible problems.

80. As a matter of drafting, the view was expressed that a few amendments were required to harmonize paragraph (4) with the new wording of paragraph (3) as adopted by the Working Group. It was thus proposed to replace the words "the communication was made" by the words "the right or obligation was conveyed". After discussion, the Working Group adopted the following text of paragraph (4):

> "Where any question is raised as to whether paragraph (3) of this article is satisfied, the standard of reliability required shall be assessed in the light of the purpose for which the right or obligation was conveyed and in the light of all the circumstances, including any agreement between the parties."

5. Paragraph (5)

81. It was observed that the text of paragraph (5) had been placed between square brackets, in order to serve as a reminder to the Working Group of the importance of registry systems, which were likely to be used for transferring rights in maritime transport in the future. It was generally felt that future work might be needed with respect to the role of registries, and particularly as regards their rights and obligations (see below, paras. 112-113). However, it was generally felt that a provision along the lines of paragraph (5) was not needed in the Model Law and that its inclusion might raise difficult questions, for example, as to the definition of a registry. It was observed that there was no need to authorize specifically the use of registries, since parties were free to establish a registry and there appeared to be no general rule of law prohibiting their use.

82. After discussion, the Working Group decided to delete paragraph (5). It was agreed that the Guide to Enactment of the Model Law should contain an indication as to the importance and foreseeable role of registries with respect to the transfer of rights and obligations.

6. Paragraph (6)

83. The Working Group found the substance of paragraph (6) to be generally acceptable.

C. Additional provisions proposed for insertion in draft article "x"

1. Application of laws or international transport conventions

84. It was pointed out that, as presently drafted, draft article "x" did not deal directly with the application of certain laws to contracts for the carriage of goods by sea. For example, under the Hague and Hague-Visby Rules, a contract of carriage meant a contract which was covered by a bill of lading. Use of a bill of lading or similar document of title resulted in the Hague and Hague-Visby Rules applying compulsorily to a contract of carriage. It was noted that, at present, those Rules would not automatically apply to contracts effected by one or more data message. It was thus proposed that

the following provision should be added to draft article "x":

> "(n) If a rule of law is compulsorily applicable to a contract of carriage which is in or is evidenced by a paper document, that rule shall not be rendered inapplicable to a contract of carriage of goods which is evidenced by one or more data message by reason of the fact that the contract is evidenced by such data message or messages instead of by a paper document."

85. It was recalled that a bill of lading was traditionally in the form of a paper document, and that data messages, although functionally equivalent to a bill of lading, were different in nature from a traditional bill of lading. There was general agreement that it was necessary to provide clearly for the applicability to a carriage contract contained in, or evidenced by, data messages, of the rules of law that would have been applicable to the same contract, had it be contained in, or evidenced by, a bill of lading.

86. It was questioned whether the result intended by the proposed addition of draft paragraph (n) to draft article "x" was not already achieved by article 4 of the draft Model Law, which provided that information should not be denied legal effectiveness, validity or enforceability solely on the grounds that it was in the form of a data message. In that connection, a concern was expressed that the proposed addition might be perceived as limiting the scope of article 4 of the draft Model Law. In response, it was observed that, while article 4 of the draft Model Law ensured that information contained in data messages would be given legal effect, that provision did not deal with the substantive rules of law that might apply to a contract contained in, or evidenced by, data messages. It was also recalled that the purpose of such international conventions as the Hamburg Rules, the Hague Rules, the Hague-Visby Rules or the Warsaw Convention was to establish a liability regime applicable to carriers in international carriage of goods by sea or by air. Each of these instruments contained specific requirements governing its applicability to any given contract. In the absence of a provision such as the proposed paragraph (n), it would be possible for a contractual party wishing to exclude the application of any of those instruments, to argue that contracts of carriage contained in, or evidenced by, data messages did not fulfil the requirements posed for the application of the liability regime. It was added that such an undesirable situation would not be avoided only by a provision such as article 4 of the draft Model Law.

87. Views were exchanged as to the reference, in the proposed paragraph (n), to rules "compulsorily applicable" to a contract of carriage, and the meaning of the phrase "that rule shall not be rendered inapplicable" contained therein. It was suggested that a simpler way of achieving the same result would be to provide that rules applicable to contract of carriage evidenced by paper documents should also apply to contracts of carriage evidenced by data messages. In response, it was stated that, given the broad scope of application of draft article "x", which covered not only bills of lading but also a variety of other transport documents, such a simplified provision might have the undesirable effect of extending the applicability of rules such as the Hamburg Rules and the Hague-Visby Rules to contracts to which such rules were never intended to apply. In the context of the proposed addition to draft article "x", it was important to overcome the obstacle resulting from the fact that the Hague-Visby Rules and other rules compulsorily applicable to bills of lading would not automatically apply to contracts of carriage evidenced by data messages, without inadvertently extending the application of such rules to other types of contracts.

88. After discussion, the Working Group adopted the proposed paragraph (n). It was agreed that an appropriate comment in the Guide to Enactment of the Model Law should explain the precise scope of the proposed paragraph (n) and clarify that it complemented article 4, without limiting or otherwise affecting the status of that article.

2. Negotiable or non-negotiable character of the rights contained in, or evidenced by, data messages

89. It was recalled that, as previously discussed by the Working Group (see above, para. 36), transport documents were subject to various substantive legal regimes and that, in some jurisdictions, the application of one or other legal regime might depend on whether the document was labelled as "negotiable"or "non-negotiable". A concern was expressed that, since draft article"x" did not contain any requirement for data messages to bear such labels, practical difficulties might arise as to determining the legal regime applicable to a contract of transport contained in, or evidenced by, data messages. With a view to accommodating that concern, it was proposed to add the following provision to draft article "x":

> "(*) Where a contract for the carriage of goods under a paper document would have contained the notation 'negotiable' or 'non-negotiable' then the data messages for forming such a contract shall indicate by a code or otherwise if it is 'negotiable' or 'non-negotiable'."

90. Some support was expressed in favour of including the proposed paragraph (*), on the condition that it were amended to indicate whether the negotiability of bills of lading was based on law or contract. In response to a concern that the proposed paragraph (*) dealt essentially with a matter of substantive law, which would better be left for the parties to settle within the framework established by applicable national laws and international conventions, it was stated that the suggested provision did not address directly the issue of negotiability of bills of lading but referred to the will, or obligation, of the issuer to mark transport documents as negotiable or not.

91. The prevailing view, however, was that the suggested paragraph (*) should not be adopted. It was generally felt that the proposed rule unnecessarily interfered with substantive law. It was also felt that adopting such a rule might raise difficulties, particularly in view of the fact that, as previously observed by the Working Group, there might be cases where a given transport document would be regarded as non-negotiable under the laws of the country where it had been issued, and as negotiable in the countries where the goods were delivered. Furthermore, doubts were expressed as to the need for the proposed rule. It was pointed out that paragraph (n) of article"x" provided that, where a rule of law was compulsorily applicable to a contract of carriage which was in, or was evidenced by, a paper document, that rule was not rendered inapplicable to a contract of carriage of goods which was evidenced by one or more data message. Thus, any requirements of substantive law concerning the labelling of transport documents that would have applied to paper documents, would also apply to data messages. It was observed that, in practice, the law applicable to the carriage of goods by sea might require the issuer of a bill of lading to note on it that it was negotiable, but did not usually require that mention be made of the non-negotiable character of a transport document. If the issuer marked the bill of lading as negotiable, the matter was resolved and the draft provision was not necessary. A question might arise in cases where the issuer failed to mark the bill of lading, but the draft provision did not address that situation. After discussion, the Working Group decided not to adopt the suggested paragraph (*).

3. Situations where paper documents and data messages might be used simultaneously

92. The Working Group was reminded of concerns previously expressed by some delegations that paper documents and data messages might be simultaneously used in connection with the same contract of transport (see above, para. 39). It was stated that such concerns should be addressed, while the possibility that the parties revert from data message interchange to paper-based transactions should be preserved, if the circumstances so required. It was pointed out that, while the parties to a carriage contract might conduct their transactions through data messages, third parties, such as customs and port authorities, might continue to require that information be provided in paper form. A provision permitting such conversion to paper should thus be contained in the Model Law. The following

provision, inspired from article 10 of the CMI Rules, was proposed for addition to article "x":

> "(**) Any person who is a party to a contract for the carriage of goods under data messages shall have the option to discontinue the use of data messages, and revert to the use of paper documents for such contract, provided that this would not cause undue delay or cause disruption in the delivery of the goods."

93. Various views were expressed with respect to the merits of the proposed paragraph (**). One view was that the inclusion in article "x" of a rule along the lines proposed was not appropriate. In support of that view, it was observed that the dangers of a hybrid system of communications, namely a system involving both paper and electronic communications, were twofold: that the system might be inefficient or that it might be insecure. If the system were inefficient, e.g., if it presented operational difficulties, parties should be left free to resolve them. If the system were insecure, paragraphs (3) and (4) of article "x" referring to acceptable standards of reliability sufficiently dealt with the matter. With regard to party autonomy, the example was given of the BOLERO System, under which EDI communications were foreseen to take place only among the members of the BOLERO Users Association, while communications with outsiders had to be in paper form. It was observed that there was no reason to impinge on the freedom of such associations to regulate the form of their communications. Moreover, it was observed that the draft provision might, without any good reason, disallow practices in which parties used different means of communications for different purposes.

94. The prevailing view, however, was that the draft provision was useful in that it addressed the fundamental need to avoid the risk of duplicate bills of lading. In support of that view, it was observed that a party, having initially agreed to engage in electronic communications, should be allowed to switch to paper communications if later it became unable to sustain electronic communications. It was stated that, in such a case, party autonomy could produce unfair results in that the stronger party could abuse of its position to force the weaker party to continue EDI communications. In addition, it was observed that the use of multiple forms of communication for different purposes, e.g., paper for ancillary messages and electronic for the bill of lading, did not pose a problem. Even article 10 of the CMI Rules, from which the draft provision was drawn, allowed the issuer of an electronic bill of lading to require a print-out of ancillary messages.

95. Several suggestions were made in order to improve on the draft provision. One suggestion was that emphasis should be placed on the legal effect of the decision of the parties to return to paper communications, rather than on that decision itself, which was a matter to be left to party autonomy. It was suggested that the first sentence of the draft provision should be replaced by language along the following lines: "Any switch between the use of data messages and the use of writing or paper documents, and vice versa, shall not affect the previous paragraphs of this article". While the suggested amendment was found to contain positive elements, the concern was expressed that it might inadvertently result in applying the Model Law even after the parties had decided to revert to paper communications. In addition, it was observed that the amendment did not address the concern expressed that the draft provision in its current version interfered with party autonomy and failed to provide that the parties could use only one means of communication at a time.

96. Another suggestion was that, in order to avoid abuse of the rule and unfair distribution of the cost of switching to paper communications, the rule should be amended so as to provide that the party deciding to "drop down" to paper should bear reasonable costs for its decision. Yet another suggestion was that, in view of the fact that EDI communications were usually based on the agreement of the parties, a decision to return to paper communications should also be subject to the agreement of the parties. That suggestion was opposed to on the ground that a rule along the lines of the draft provision would have to be applied by the bearer of a bill of lading and that it should be up to the bearer to decide whether it preferred to exercise its rights on the basis of a paper bill of lading or on the basis of

the electronic equivalent of such a document, and to bear the costs for its decision.

97. Pursuant to the above-mentioned discussion, the Working Group entrusted an ad hoc drafting group with the task of revising the draft provision. The Working Group continued its deliberation on the basis of a revised draft provision, which read as follows:

> "The use of data messages for the transfer of rights and obligations in connection with a contract of carriage of goods can be discontinued and substituted by the use of paper documents, and vice versa. Such a substitution shall only take effect after notification of the parties, and shall not affect or relieve the rights and obligations of the parties involved."

98. Several views and concerns were expressed with regard to the draft provision as revised. One view was that paragraphs (3) and (4) of draft article "x" sufficiently dealt with the risk of duplicate bills of lading. In addition, it was observed that the risk of duplicate bills of lading was also addressed in article 9 of the draft Model Law, which would ensure that data messages were recognized in court as equivalent to bills of lading. In case of fraudulent duplicate bills of lading, the courts would be left to determine which one was the authentic one. In response, it was observed that, while national laws dealt sufficiently with fraudulent bills of lading, they failed to provide certainty with regard to the unconscious issuance of duplicate bills of lading. In that regard, the example was given of the local agent of a party issuing a paper bill of lading, while the main parties, communicating electronically, issued an electronic bill of lading.

99. A concern was expressed that the revised provision dealt not only with the simultaneous use of multiple means of communication, a practice to be discouraged in any case, but that it also interfered with the freedom of the parties to use one or another means of communication. It was stated that the draft provision could override agreements of the parties, in particular since it was not clear yet whether article 10(1) of the draft Model Law would apply to the provisions of the chapter in which the draft provision might be included. In response, it was observed that the first sentence of the draft provision was permissive and did not affect party autonomy in that it used the verb "can". It was suggested that, in order to avoid interference with party autonomy, the verb "may" might be better used and language along following lines might be added: "without prejudice to the parties providing otherwise". Those suggestions were objected to on the ground that allowing parties to deviate from that rule would have the effect of reintroducing the problem which the rule attempted to address, namely the risk of duplicate bills of lading and of the unfair treatment of the party which could not continue communicating electronically.

100. Other concerns expressed with regard to the draft provision as revised included: that the draft provision introduced uncertainty, since it was not clear who should give notification and to whom; and that it might produce undesirable results to all parties concerned in the contract of carriage, shippers, carriers, consignees and financing institutions providing documentary credit, since the words "vice versa" indicated that, upon notification of the other party, a party might switch from paper to electronic communications. In response to the latter concern, it was observed that, while that possibility theoretically existed, the words "vice versa", in practice, would be meaningless unless the parties had the capacity to communicate electronically.

101. In order to alleviate the above-mentioned concerns, the suggestion was made that the first sentence of the draft provision should be amended to read as follows: "Where data messages are to be used to transfer rights and obligations in connection with a contract of carriage of goods, no paper document affecting such rights is valid unless the data message has been terminated in favour of paper documents".

102. It was noted that the draft provision as revised still raised some questions, including what

would be the context in which data messages could be used to transfer rights and obligations, what was the meaning of the term "data message method", who would notify whom, how and when. In order to address those questions, a second ad hoc drafting group was requested to revise the provision. The revised provision read as follows:

> "Where one or more data message is used to effect the actions in paragraph (1)(f) and (g) of this article, no paper document used to effect such actions is valid unless the use of data messages has been terminated and substituted by the use of paper documents. Such a substitution shall not affect the rights, or relieve the obligations, of the parties involved"

While a concern was expressed that the revised draft provision did not establish any condition for the decision of a party to revert to paper communications, such as the ones included in previous versions of paragraph (**), e.g. notification or absence of undue delay or disruption in the delivery of the goods, the Working Group adopted the revised draft provision and decided that it should be placed immediately after paragraph (2) of draft article "x".

103. Upon conclusion of its deliberations regarding draft article "x", the Working Group considered a revised draft of that draft article prepared by the Secretariat to reflect the decisions taken by the Working Group. The text of draft article "x" as adopted by the Working Group is reproduced as an annex to the present report.

IV. PRELIMINARY DISCUSSION OF POSSIBLE FUTURE WORK

A. Future work on issues of transport law other than those concerning EDI

104. At various points during the discussion it was recalled that treaties on the carriage of goods by sea did not deal, or dealt fragmentarily, with issues such as the functioning of bills of lading and sea way-bills and the relation of those transport documents to the rights and obligations between the seller and the buyer of the goods, negotiability and non-negotiability of transport documents, title to goods, retention of title, right of control of goods including the right to stop goods during transit, rights of security created by the transfer of transport documents (see above, paras. 33 and 63). Also national laws on the carriage of goods by sea, but for a few exceptions, did not provide comprehensive and harmonized solutions to those issues. Answers were thus largely to be found in usages, customs and case law, which were not harmonized. The consequence was legal uncertainty in practice.

105. It was considered that the Model Law was not the proper place for providing solutions to those issues, since the Model Law applied to trade law in general, while those issues concerned the law of transport.

106. It was generally thought that it would be useful to review current international practices and international texts governing the carriage of goods by sea with a view to preparing modern, harmonized and more comprehensive solutions to those issues. Among the issues on which uniform law might be needed, it was suggested that issues regarding the functions served by transport documents with respect to the transfer of rights and obligations with respect to goods in transit might need to be dealt with in priority.

107. The view was also expressed that work in that area would provide a useful opportunity to discuss issues of liability under the legal regime of carriage of goods by sea. Among the texts that were suggested to be included in the review were the United Nations Convention on the Carriage of Gods by Sea, 1978 (Hamburg Rules); the different regimes based on the International Convention for

the Unification of Certain Rules relating to Bills of Lading, 1924 (Hague Rules) and the subsequent amendments to the Hague Rules; United Nations Convention on the Liability of Operators of Transport Terminals; and the United Nations Convention on International Multimodal Transport of Goods, 1980.

108. The Working Group considered that it was for the Commission to discuss and decide on the desirability of such future work, its scope and the most appropriate methods of work. It was considered important that the work, from its initial stages, should be carried out in close cooperation with relevant organizations, including those that represented the industries concerned, such as the Comité Maritime International (CMI), the International Chamber of Commerce (ICC), the International Union of Marine Insurers (IUMI), the International Federation of Freight Forwarders Associations (FIATA), the International Chamber of Shipping (ICS) and the International Association of Ports and Harbors (IAPH).

B. Future work on specific issues regarding the use of EDI and related means of communication

109. Among the topics possibly to be considered for future work by the Commission in the area of electronic communications, the Working Group considered the following: possible standards for digital signatures; issues of registries; incorporation by reference; rights and obligations of service providers; and review of existing international conventions.

1. Possible standards for digital signatures

110. The view was expressed that, aside from those aspects relating to "signature" and reliance on messages that were already dealt with in the draft Model Law, more might need to be done on rules for EDI infrastructure before it could achieve its real potential. This was said to be the case especially in international communications involving remote parties, or transactions in which the speed with which contractual events took place in computer systems would necessitate a major upgrading of legal standards on signatures and, more generally, on authentication as to the source and content of data messages. Such standards might take several forms but most current analyses carried out by practitioners focused on the expected growth of "certifying authorities", which could be either private or public actors, operating under some appropriate regulatory standards, which could provide grounds on which reliance could be based on digitalized authorization and identification of messages. This was said to be especially important in an age of information service providers, such as the Internet, which would bring into commercial contact remote parties whose only identification capacity was through computer media.

111. While the Working Group felt that work with respect to certifying authorities might be needed, and that such work would probably need to be carried out in the context of registries and service providers, it was generally agreed that it should not embark in any technical consideration regarding the appropriateness of using any given standard.

2. Issues of registries

112. It was stated that the development of harmonized minimum standards that would permit private or governmental registries to interface with each other in cross-border transactions was a key to future development of certain important sectors where electronic communications would be used. Harmonized standards might need to be different for different categories of commercial undertakings. A first step presumably would be to identify key factors that might be necessary for each sector, and then to establish which factors could be provided for in uniform rules. Such an approach could permit collaborative work between UNCITRAL and UNIDROIT, since the latter would shortly be holding a meeting covering registration of certain types of mobile equipment.

113. It was generally felt that the topic might need further consideration. When examining the feasibility of undertaking work in that area, the following might need to be considered: the standards for authorization of private or governmental registries; the criteria for acceptance (and possibly enforcement) of registrations from one jurisdiction to another; the standards for minimum information required to assure reasonable notice and entitlement to register; the effects of registration and notice on third parties in the country of registration and elsewhere; possibly, the implications of registration on secured interests or other commercial finance rights and obligations; the degree of reliance by third parties on such registration as the basis on which contractual, financial or other obligations or actions would be taken; and the extent to which, if any, third parties would have the right to access registries. Agreement or guidance on international standards before disparate systems were established might have the potential to achieve much greater harmonization and benefits.

3. Incorporation by reference

114. The Working Group was generally agreed that work with respect to incorporation by reference in the context of EDI was needed. The view was expressed that, in any attempt to establish legal norms for such incorporation of reference clauses in data messages, the following three conditions should be met: (1) the reference clause should be inserted in the data message; (2) the document being referred to, e.g., general terms and conditions, had actually to be known to the party against whom the reference document might be relied upon; and (3) the reference document had to be accepted, in addition to being known, by that party. It was generally agreed that the topic of incorporation by reference would appropriately be dealt with in the context of more general work on the issues of registries and service providers.

4. Information service providers

115. It was recalled that in its prior work with respect to the draft Model Law, the Working Group had focused on the relationship between the sender and the recipient of a data message, in an attempt to address the legal significance of such messages and the rights and responsibilities of the sender and recipient. To a great extent, the draft Model Law omitted an essential participant in electronic commerce: the intermediary or information service provider who would be responsible for the interface between transmissions from the sender to the recipient, and who would often provide value-added services such as message logging or date stamping, set security standards for message transmission, and serve an important role with regard to assuring users about the reliability of the communication system.

116. The following were mentioned as possible issues to be considered with respect to service providers: the minimum standards for performance in the absence of party agreement; the scope of assumption of risk by the end parties; the effect of such rules or agreements on third parties; allocation of the risks of interlopers' or other unauthorized actions; the extent of mandatory warranties, if any, or other obligations when providing value-added services.

117. It was widely felt that it would be appropriate for UNCITRAL to examine the relationship between service providers, users and third parties. It was said that it would be very important to direct such an effort toward the development of international norms and standards for commercial conduct in the field, with the intent of supporting trade through electronic media, and not have as a goal the establishment of a regulatory regime for service providers, or other rules which could create costs unacceptable for market applications of EDI.

5. Review of existing international conventions

118. It was stated that the Working Party on Facilitation of International Trade Procedures (WP.4)

of the Economic Commission for Europe had been engaged for several years in a survey of definitions of such notions such as "writing" and "signature" in existing international conventions applicable to international trade. It had often been pointed out that most existing definitions did not apply satisfactorily in the context of the use of EDI. In addition, it was stated that WP.4 had also circulated a questionnaire, which was aimed at assessing, more generally, the nature of obstacles to the increased use of EDI, whether such obstacles might arise from legal, administrative, or other requirements.

119. It was generally felt that it would be particularly appropriate for UNCITRAL to review the results of those two projects undertaken by WP.4, with a view to assessing the desirability and feasibility of undertaking work in those areas. The Working Group expressed the wish that the results of those two projects would soon become available and welcomed the possibility to collaborate more closely with WP.4.

Annex

Text proposed for addition to the draft UNCITRAL Model Law
on Legal Aspects of Electronic Data Interchange and related Means of Communication

(as approved by the UNCITRAL Working Group on Electronic Data Interchange
at its thirtieth session, held at Vienna, from 26 February to 8 March 1996)

PART II. RULES CONCERNING TRANSPORT DOCUMENTS

Draft article "x". Contracts of carriage of goods involving data messages

(1) This article applies to any action in connection with, or in pursuance of, a contract of carriage of goods, including but without limitation to:

(a) (i) furnishing the marks, number, quantity or weight of goods;
(ii) stating or declaring the nature or value of goods;
(iii) issuing a receipt for goods;
(iv) confirming that goods have been loaded;

(b) (i) notifying a person of terms and conditions of the contract;
(ii) giving instructions to a carrier;

(c) (i) claiming delivery of goods;
(ii) authorizing release of goods;
(iii) giving notice of loss of, or damage to, goods;

(d) giving any other notice in connection with the performance of the contract;

(e) undertaking, irrevocably or not, to deliver goods to a named person or a person authorized to claim delivery;

(f) granting, acquiring, renouncing, surrendering, transferring or negotiating rights in goods;

(g) acquiring or transferring rights and obligations under the contract.

(2) Where a rule of law requires that any action referred to in paragraph (1) be carried out in writing or by using a paper document, or provides for certain consequences if it is not, that rule is satisfied if the action is carried out by using one or more data message.

(3) Where one or more data message is used to effect the actions in paragraph (1)(f) and (g) of this article, no paper document used to effect such actions is valid unless the use of data messages has been terminated and substituted by the use of paper documents. Such a substitution shall not affect the rights, or relieve the obligations, of the parties involved.

(4) If a right is to be granted to, or an obligation is to be acquired by, one person and no other person, and if a rule of law requires that, in order to effect this, the right or obligation must be conveyed to that person by the transfer, or use of, a paper document, that rule is satisfied if the right or obligation is conveyed by any means which includes the use of one or more data message, provided a method is used to give reliable assurance that the right or obligation has

become that of the intended person and of no other person.

(5) Where any question is raised as to whether paragraph (3) of this article is satisfied, the standard of reliability required shall be assessed in the light of the purpose for which the right or obligation was conveyed and in the light of all the circumstances, including any agreement between the parties.

(6) If a rule of law is compulsorily applicable to a contract of carriage of goods which is in, or is evidenced by, a paper document, that rule shall not be rendered inapplicable to a contract of carriage of goods which is evidenced by one or more data message by reason of the fact that the contract is evidenced by such data message or messages instead of by a paper document.

(7) The provisions of this article do not apply to the following: [...].